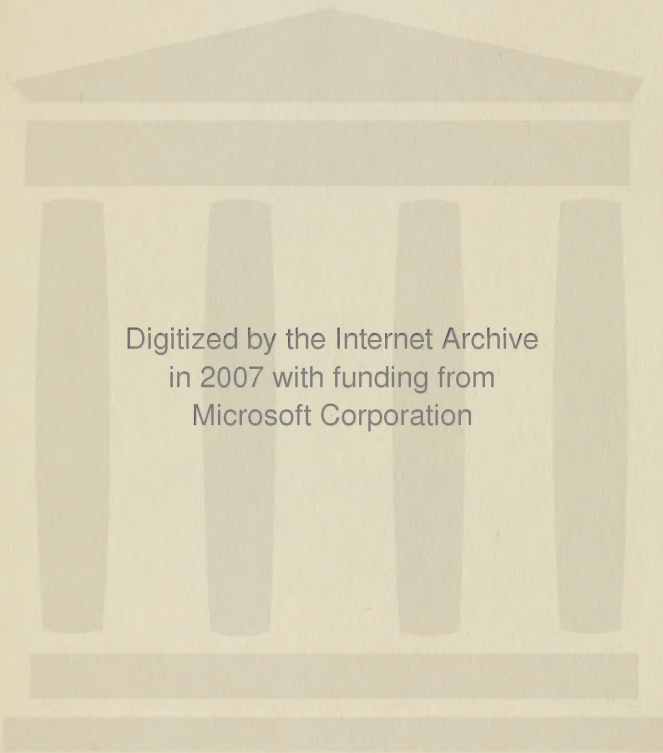

THE LAW

RELATING TO

CONTRACT OF SALE OF GOODS

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SIX LECTURES

DELIVERED AT THE REQUEST OF

THE COUNCIL OF LEGAL EDUCATION

BY

WILLIAM WILLIS

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LONDON
STEVENS & HAYNES
Law Publishers
13 BELL YARD, TEMPLE BAR
1902

PREFACE

In the month of June 1901, I received an invitation from the Council of Legal Education, to deliver a course of six Lectures on the Law relating to the Contract of Sale of Goods. I at once acceded to the request, and, in the months of October and November following, the six Lectures were delivered in the Hall of Lincoln's Inn. During their delivery, I found that I could not treat of the whole of the law of contract of sale of goods, and could only give a bare outline of those parts with which I dealt. The general principles which underlie this portion of our law are, I think, correctly set forth. My object in delivering the Lectures was, if possible, to facilitate the study of the provisions of the Sale of Goods Act, 1893.

The Lectures were not penned: they were delivered without verbal preparation, taken down in shorthand, and subsequently revised. By this method the Lecturer awakens a considerable interest in the minds of his hearers, but cannot attain to more than a substantial accuracy. I hope, however, that this result has been secured.

If the Lectures were profitable when spoken (and to some extent I believe they were), I hope they will be profitable now they are in print. The Lectures are published at the instance of many who heard them.

The proof-sheets of the Lectures have been read by my friends, Mr. Julian Robins, Mr. Frank Newbolt, and Mr. P. T. Blackwell. I am indebted to them, I think, for some useful suggestions. These gentlemen are in no way committed to the opinions expressed in the Lectures.

The List of Cases and the Index have been prepared by Mr. P. T. Blackwell, to whom I tender my thanks for his kind services.

WILLIAM WILLIS.

TEMPLE, *July* 1902.

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LECTURE I

GENTLEMEN,—If any of you are coming for the first time, to the study of the law relating to the Sale of Goods, I have great pleasure in telling you, that a large portion of that law is of the simplest kind, and that it is not requisite to its due appreciation and use, that you should master other and more difficult portions. "Buying and selling" enters very largely into the business of life, and it would indeed be strange, if much legal difficulty should attend it. The law relating to the Sale of Goods is founded, for the most part, on the usages of trade and the expectations of persons who engage in it. Persons not engaged in trade also frequently buy and sometimes sell; they are familiar with the meaning of "contract of sale," and they also know many of the obligations to which the contract of sale gives rise. They know that if they buy goods, the seller must deliver them, and they themselves must pay for them; that if credit is given, the buyer cannot be asked for payment or sued until the credit has expired; that if buyers and persons who have given orders, refuse to receive the goods purchased or goods tendered in conformity with the order, an action will lie for their non-acceptance; that if the parties to the contract have

not fixed the price to be paid for the goods, the vendee must pay a reasonable price for them; that a person is entitled to receive the goods he has bargained for; that if a seller sends a larger quantity of goods than has been ordered, the person who has given the order may reject the whole, but that if he keeps the goods, he must pay for them; that the vendee who has purchased goods, by means of a sample, is entitled to have the bulk of the goods delivered to him, equal to the sample. These propositions, and others as simple, make up a very large portion of the provisions of "the Sale of Goods Act, 1893."

May I give you a few more illustrations of the simplicity of portions of this law and of the knowledge, which, without the study of any statute or any law book, persons engaged in trade possess? Endeavouring to administer justice, in a district, where many small farmers live, persons who cultivate the soil and sell its produce, I have observed, with surprise, the clearness with which, in their own way and in their own words, they express some of the rules of law which are of frequent application. I have heard a peasant brought up in the Fens, when I have said, "What is your defence to this alleged sale of goods?" quickly reply: "I had 'em on liking and did not like 'em." The good man did not know, in the language of codifiers, the goods had been delivered to him on approval, or on sale or return. I have listened while an aged man of over four-score years has said: "I don't say you used the word 'warranty,' man; but I said to you 'Is she in calf?' You said she was. I said, 'Do you sell her as such?' and you said you did; and I shall ask the guv'nor here"—pointing to me—"to say 'that she was in calf' was in our bargain." He did not know, perhaps, that he was stating a very important rule for the guidance of those who have to determine whether a representation made at the time of the sale forms part of the contract, a rule, so far as I know,

not referred to in "the Sale of Goods Act, 1893." On another occasion the defendant said to me: "Am I to pay for what I cannot offer in the market? I gave this man here" (meaning the plaintiff) "an order for strawberries, and when he brought them to me they were only fit to throw away. I would not take them." In my opinion, the facts being as he stated them, he disclosed a perfectly good defence to the action. A woman has said to me—a bright business woman—"I agreed for a particular description of goods, and when the plaintiff's goods came they were not of the kind I asked for." I said to her; "Madam, if yours is a contract for the sale of goods by description, the Sale of Goods Act says 'there is an *implied condition* that the goods shall correspond with the description.'" She readily replied: "I don't know anything about your conditions or your Sale of Goods Act, but if you listen"—a very proper monition to a judge—"you will hear what I asked for and what he said I should have. I have his word, not a condition." Notwithstanding the provision of the Sale of Goods Act, I think the good woman's criticism was just, and it is scarcely possible to take down the facts relating to a contract for the sale of goods by description without finding therein a *promise* by the vendor that the vendee shall have what he is asking for.

I have given you these illustrations, in order to show you that a large portion of the law, relating to contracts for the sale of goods, may be learned in a few hours, devoted to its study. I am bound, however, to tell you all, that there are portions of this law that call for the closest study, a strong memory, and a fairly clear intellect. The mastery of these portions will discipline the mind and make you familiar with some legal conceptions, which, if once seized and held strongly, will fit you to acquire, with greater ease, a knowledge of every other department of law. The portions to which I refer are those concerning the nature and meaning of

possession and ownership; the transfer to the vendee of the property in the goods sold without the delivery to the vendee of any part of the goods sold; the vendor's lien for unpaid purchase money; his right to retain the goods, analogous to the right of stoppage *in transitu;* the right of stoppage *in transitu* itself; the provisions of the 4th section of the Sale of Goods Act, being a reproduction, with some material alterations, of the provisions of the 17th section of the Statute of Frauds (29 Chas. II. c. 3) and the 7th section of the 9thGeorge IV. cap. 14. These portions of our law stand clearly expressed in the matchless volume entitled "The Effects of Contract of Sale on Rights of Property and Possession," by Colin Blackburn, who afterwards became Lord Blackburn, "a clear-headed and learned judge," to use the language which Chief Justice Erle applied to him. Lord Blackburn wrote for lawyers and assumes that his readers are well acquainted with the phrases: "property" and "possession," "contract" and "conveyance"; and that they use those phrases with a clear definite meaning. I found in former days, when I prepared young men for examination, that they were reading his Lordship's book without any clear notions of "property" and "possession," "contract" and "conveyance," and that consequently they derived very little advantage from their study and found the book exceedingly difficult to understand. The Sale of Goods Act, 1893, acquiesced in by the most learned lawyers in both Houses of Parliament, has darkened, in my judgment, much of the clear and explicit teaching of Lord Blackburn, and I do not hesitate to say, that if a barrister committed to memory all the provisions of the Sale of Goods Act, with the exception of the plain and simple principles, which he must have known before he began his study, he would, if he had no other knowledge, be absolutely unfitted to present the rights of parties before judges who have derived their great learning from long and careful study of decided cases, which will still,

except where expressly overruled, govern the interpretation of the Act.

In offering observations on the Sale of Goods Act, which, to some extent, I must take as my guide, and in lecturing before you, I do not pretend to have attained. I am only pressing, I think, somewhat towards the mark of our high calling. I am here to give you the result of my own studies long continued, and to desire you to exercise your own judgment on all you hear and on all you read, without which you will, in the contentions of the Courts, be as a reed shaken with the wind. I purpose addressing you in the simplest language, giving you as far as possible clear and simple illustrations of great principles. I purpose addressing you as if you were all uninformed; I may thus assist some earnest youth seeking instruction. Let those, who are informed, remember the old proverb, that repetition is the mother of knowledge.

I purpose, then, this evening, to commence with an explanation of the four great phrases to which I have referred; an explanation of which you will see the need, as soon as you read the first section of the Sale of Goods Act. We must now take the definition of a contract for the sale of goods, from the Sale of Goods Act, 1893. That is declared by the legislature to be the true definition of a contract for the sale of goods. I do not propose to criticise it at great length. I wish it had been simpler and had postponed some of its implications until greater knowledge had been obtained by the student. Let us read it. "A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a monetary consideration called the price." There is an alteration here, I think, in the law of England; for until the Act of 1893 any consideration for the acquisition of goods by contract or agreement, would have constituted a contract for the sale of goods. To-day the contract of sale

must be "for a monetary consideration called the price." A transaction, in which goods are exchanged for goods, has always been called a contract of barter.

You may see at once, on reading the definition, at least I do, although it is not very clearly presented, that a contract of sale may of itself, without delivery, transfer the property in the goods sold, and that contracts of sale are of two kinds, namely, sale and agreement to sell. I want you to follow me when I state, that this division into sale and agreement to sell is effected, not by any words the parties may use, though the words of the parties are important, but by the effect itself of the contract into which the parties have entered. If the property passes by the contract, the contract is styled in the Sale of Goods Act a "sale" and all other contracts of sale are described as "agreements to sell." If, therefore, the word "sale" is used in its precise meaning, it means "a contract by which, without the delivery of the goods or any part of them, but by the contract itself, the property in the goods passes to the purchaser." The word "sale," I should tell you, because I hope you will still read some of the decided cases, at least before you think yourselves equipped for your profession, is our old friend "bargain and sale" of pleading notoriety; and the expression "bargain and sale" is used in nearly all the authorities prior to 1893. A "bargain and sale" is frequently, in law books and in the decisions of the judges prior to 1894, styled "an executed contract," and an agreement to sell is styled "an executory contract." As you may meet with those words it is well to explain them. The word "executed" does not mean that the obligations under the bargain and sale are all performed, but that it is a complete and, as it is sometimes called, an actual sale; and a contract which is not a bargain and sale and under which the property has not passed, whatever its provisions, is an "executory" contract of sale. Some of you who are students of the law of the

Chancery Division may remember an analogous use of those words in the phrases, executed trusts and executory trusts; "executed trusts," as I understand the phrase, not meaning that the trusts have all been performed, but that they have been declared and ascertained; "executory trusts" being used to indicate that the trusts are to be more fully set forth in an instrument to be prepared.

In much the same way, our Common Law lawyers used the words "executed" and "executory" with respect to contracts of sale. The word "executed" has reference to the cases in which the property in the goods has by virtue of the contract itself, passed to the vendee. The contract is thereby deemed actual or perfect—that is executed; where the property in the goods has not passed, the contract is styled executory. The bargain and sale of our law answers almost exactly to the *perfecta emptio* of the Roman Law and to "Sale" of the law of Scotland. The Act of 1893 appears to me to have affected the law of Scotland very seriously, unless I have overlooked some of its provisions. Until 1893 the bargain and sale of the English Law answered also very much to the "sale" (for that is the word as I understand) which is used in Scotland to represent a perfect and actual sale; but there was a great distinction between the Roman Law and the Scotch Law prior to 1893, and the law of England. In the Roman Law, the contract of sale never of itself passed the property to the purchaser; traditio or delivery was essential to its transfer; and in the Scotch Law prior to 1893 I apprehend the law was exactly the same. Sometimes consequences followed from the sale in the Roman Law very much like those in our own; thus, where the property has passed, everybody knows, it being a sound maxim of our law *res perit suo domino*, that the vendee suffers the loss if the thing sold perishes before delivery. In the Roman Law, it is true, that if the subject of a sale perished before delivery, the loss

fell on the vendee; not because the property had passed by the contract of sale, but because in the Roman Law the engagement of the vendor and the engagement of the vendee were absolutely distinct and independent, and one could be enforced although the other could not. Consequently, if the subject-matter of the sale perished without any fault on the part of the vendor, in the Roman Law, the vendee must still pay the price. This result in the Roman Law is, however, far from answering to the condition of our own law under which, by the contract of sale, the property itself passes to the vendee. The contract of sale in English Law sometimes has the effect of a conveyance, and a bargain and sale is in some respects a contract, in other respects a conveyance. The vendor can still sue the vendee, and the vendee only, for the price. The vendee has become, however, the absolute owner of the goods. They will pass to his assignee on bankruptcy subject to the vendor's lien or any other conditions, and will also pass to the representatives of the vendee on his death. He can sell and transfer the ownership of the goods although he has never had the possession of them. He is, of course, if he has paid the money for the goods before delivery, an absolutely secured creditor. If the vendee should have paid money for goods under an executory contract of sale, and the vendor becomes bankrupt, the vendee will lose the money he has advanced except so far as a dividend may be payable to the vendee from the estate of the vendor; but with respect to a bargain and sale, the property in the goods passes, and the vendee has a security for whatever advance he may have made. Gentlemen, it is of the utmost importance that any person who desires to protect quickly the rights of those who consult him, that he should know this part of our law. Remember, this part of our law may be of great service in case of an execution being put in upon the goods of the vendor. I have known people forget, that although the goods seized by the judgment creditor

were in the *possession* of the judgment debtor, the *property* in them may be no longer vested in him. The judgment creditor can only seize that to which the judgment debtor is legally and beneficially entitled, and the vendee, if the property in the goods has vested in him, can step in and claim them. He may on an interpleader try the question, whether he is or is not the owner of the goods which were in the hands of the judgment debtor and which have been seized by the sheriff. If the property in the things has passed to the vendee and they have perished through fire or shipwreck before delivery, the vendee is the loser. All these consequences of the property passing by the contract itself must be kept before your mind, and to them I have desired to call your particular attention. You will see that some writers, among them Mr. Austin (and I trust you will read his works, and, I hope, never open his pages without instruction), contend for keeping distinct, and some systems of jurisprudence have kept clearly distinct, "contract" and "conveyance." This distinction is not maintained by the law of England.

Contract may be defined as an agreement between two or more parties by which for a consideration supplied by one of the parties, the other agrees to do, or abstain from doing, something. Contract has, as a rule, no effect upon the subject-matter of the contract, and gives rise only to personal obligations. It creates rights as against a determinate person or determinate persons; the only right to which it gives rise is what is called a "*jus in personam*"—a right to call upon a man or a certain number of men to do or abstain from doing something. Conveyance is the mode by which the ownership in a movable or immovable thing is transferred from one man to another, and, unless there are personal obligations accompanying it, the conveyance imposes, as a rule, no obligation on the transferor or transferee. The person, in whose favour the conveyance is effected, acquires, as a rule, no "*jus in personam*";

he acquires the ownership or what is sometimes styled a "*jus in rem*." A *jus in personam* is a right only against a determinate person or persons; a *jus in rem* is a right availing against all the world, and "property" is very frequently expressed by the phrase "*jus in rem*." The bargain and sale of English law transfers the property without any conveyance. The right, where the property does not pass by the contract, in the case of a particular thing agreed to be sold is styled a *jus ad rem* (acquirendam). You will find that is the phrase used by Lord Watson in stating what was, prior to 1893, the effect in the Scotch Law of the existence of "a sale." I can commend to your careful study the judgment of Lord Watson in *Seath* v. *Moore*, L. R. 11 App. Cas. 350.

The conveyance of chattels under the English Law may be effected by delivery with the intention to pass the property in them, or by an instrument under seal. Those are the ordinary modes of conveying personal chattels from one man to another. You must, however, remember, that the property in personal chattels may be transferred by contract alone, without any delivery. The difference between contract and conveyance is distinctly seen by a reference to the common law relating to the sale of an estate in land. By the Common Law of England, the sale of an estate in fee simple, in no degree affected the property in the land until there was an actual conveyance either by livery of seizin in former days or by lease and release, or by a deed under the 8 & 9 of Victoria. The contract itself passed no interest whatever, but the vendor remained owner of the estate, notwithstanding the contract of sale. The Common Law thus kept contract of sale and conveyance, in the case of land, quite distinct. If the vendor would not convey, the only remedy for the vendee was an action for damages. When the Court of Equity began to decree specific performance of a contract of sale of land, then that personified abstraction called "Equity" said it looked upon that as done,

which ought to be done, and regarded the vendee as owner of the estate. Hence a contract of sale of real estate, of which the Courts of Equity would decree specific performance, had the effect of transferring the property in equity, and before any conveyance the vendee acquired an equitable estate in fee simple. You thus have another instance of contract operating as a conveyance. I have mentioned to you the consequences which result from this principle; it is most important that you should have them in your mind. The vendee without getting possession of any portion of the goods sold has, by virtue of a Bargain and Sale or now by "Sale," all the rights of an owner and may assert the same against any one; as against the vendor, subject of course to any lien he may have for unpaid purchase money.

Having defined and contrasted contract and conveyance, let me now endeavour to put a meaning on the words "property" and "possession." In every political society of which we have any record, you meet with "property" and "possession." They are not often defined, and it is difficult to find any definition of "property" and "possession" in the English Law; and even as late as the beginning of the last century, did a great German professor discover the true meaning of the word *possessio* which the Roman lawyers had left to some extent undefined.

As to the word "property," I will endeavour to give you the meaning with which I have always used it; and as you have these two words "property" and "possession" I beg of you not to confound them. You will find some judges, eighty or a hundred years ago, talking, as if they had no very clear conception of the distinction between property and possession. Now what do I mean by "property"? I mean by "property," the sum of all the ways in which a movable or immovable thing can be *lawfully* used and enjoyed; together with the right to the possession of the same.

I know this is indefinite, because the uses to which a thing can be put are so various; they are almost infinite. By "property" of course I do not mean the thing which you look at and see. I do not use the word "property" in the sense in which that word is used when people say it is a pleasant "property" on which to live, or that it is a paying "property," or that it is a "property" which fairly could stand certain charges and burdens. No. The rights I am speaking of you can neither see nor touch, but they are perfectly real; and if you attempt to violate any of the rights to which I shall presently refer, you may be condemned in damages, and the Court of Chancery or even our Common Law Courts may grant an injunction to restrain you from repeating the acts complained of. Now do not forget, "property" is the sum of "all the ways." The ways are constantly being fixed by decision of the Courts and the only thing to do, is to note every decision which decides that "property" involves the right to a particular user. When I first became a student, there was a case which involved a great deal of discussion and difference of opinion; it was ultimately decided by the House of Lords. Men kept running about and deciding it one way or the other, by the phrase *sic utere tuo ut alienum non lædas*. This maxim conveys not the slightest information to my mind. If you mean by "*tuo*" the thing in respect of which a man is the owner, then arises the question what rights does ownership or *dominium* comprise; the answer to the question will demand the study of a large portion of the law. If you mean by "*tuo*" the rights which can be exercised over a thing, you do not hurt anybody by exercising them. The case to which I refer was that of *Chasemore* v. *Richards*, 7 House of Lords Cases 349, wherein the question was, whether the owner of an estate in land could sink an artesian well in his own soil and draw into the well all the water percolating in his own land thereby leaving an adjoining stream greatly diminished

in volume, without enough water to turn a mill, which the stream had turned for many years. In the House of Lords it was decided, that the sinking the artesian well with all the consequences to the neighbouring mill owner, was a lawful way of using the land. That is one of the rights now comprised in *dominium* or property. I ought not perhaps to apply the word *dominium* to the ownership in land of a private individual, seeing according to the law of Real Property, the *dominium* is in the Crown and the fee simple only is in the subject. You understand me; when I use the word *dominium*, I mean the entire and largest interest a man can have in land. Of course a man can dig and plough and plant and destroy and cut down trees, pull down buildings, build up walls, enclose his park; in fact he can deal with the soil or the surface in hundreds of ways and you never will be able to state exhaustively the ways in which the thing can be used. These observations will apply to personal chattels, such as a bale of cotton. It is not easy to state all the ways in which cotton can lawfully be used or employed. The sum of all of them is what I mean by ownership or property, and I apply the word *dominium* to just that very sum. If you look in Mr. Austin's Treatises, you will find he has laboured most intensely to give a definition of "property," and he, seeing that sometimes small portions that give the right of possession, may entitle the owner to an indefinite number of ways of user, has decided to apply the word property to "any portion which gives an indeterminate user." Consequently he uses the word *dominium* or property to describe the fee simple. He would also use the same word to describe an estate for life, and he would use the same word to describe a lease for years; because both these interests entitle a man to the most varied user, but one, of course, far less than the other. For my own part, I do not care to follow Mr. Austin in these distinctions. I prefer to have one word for all

the rights which a person can enjoy, in respect either of a piece of land or a chattel, using in such case the word *dominium* or property. There are fragments of dominion, some entitling you to possession and some not. A tenancy for life is a fragment of *dominium*, and if there is no estate in front of it, it entitles its owner to possession. The same with a lease for years; but a right to walk or drive over a piece of land or a right to conduct water thereon involves no right to the possession of the land. The sum of all the ways in which a thing can be lawfully used or enjoyed is the *dominium*. Any thing less than the *dominium* is a fragment of *dominium* or a personal servitude, to use the language of the Roman lawyers. When I speak, therefore, of a man having the property in a particular thing, I mean that in him reside all the rights which can possibly be exercised in respect of it or over it. For this treatment of the subject I am bound to acknowledge my obligation to Sir Henry Sumner Maine, whose lectures I attended, now more than forty years ago, on the Roman Law; when in the prime of his youth and in the full possession of his great learning, he instructed and delighted those who had the privilege of hearing him. This phrase will guide you; "the sum of all the ways in which a thing can be lawfully used and enjoyed constitutes *dominium* or property, of which, unless separated by the act of the owner or otherwise, the right to possess is one;" because without possession the rights of ownership for the most part cannot be enjoyed. Therefore it is, that every person who has the ownership, is *primâ facie* entitled to possession.

I must, however, call your attention to a distinction between things movable and immovable according to the law of England. According to the law of England a man although entitled to possession cannot maintain any action of trespass in respect of land unless he was actually in possession at the time of the trespass.

In some cases it may be, that his entry relates back to a time prior to the trespass and so the act of trespass may be described and regarded as a disturbance of his possession; but he must have actually entered into possession in order to maintain an action for trespass. In the case of personal chattels, you must never forget, that the ownership of personal chattels entitles the owner to maintain an action of trespass or of trover for the conversion of goods, although he has never had possession of the goods. Do not forget that, because when I hereafter come to discuss with you that which I think I may say is obscure in the Sale of Goods Act, 1893, as to what conditions the vendor can impose when he parts with the goods to a carrier, or some third person, to be conveyed to the vendee, you will have to remember this, that if the property has passed and the vendee is entitled to the possession, the vendor can impose no condition on the delivery, and the vendee can maintain an action of trover against the carrier or any one who keeps the goods from him. When you come to the *jus disponendi* (a word which has been coined since I came to the study of the law) you will see the importance of keeping this principle in mind.

I now direct your attention to the word "Possession." I told you ownership entitles the owner to possession; but bear in mind this, you may have possession separate from ownership. Possession is an incident of ownership; but you can have possession separate and apart from ownership, and there is nothing so quick on earth as the change which the law of England effects in the rights of a vendor when the property passes by the contract itself. If the property passes, the vendor's ownership, without a single act of either vendor or vendee, is changed into possession, and the vendee becomes the owner, on the instant. The vendor, therefore, where the property passes by contract is in a moment reduced from ownership to possession. This word "possession"

will be of the utmost importance in dealing also with receipt of goods under the 4th Section of the Sale of Goods Act. Although the property passes, the possession is still in the vendor and that he cannot part with, without some act or agreement, of his own. Therefore on a sale where the property passes by the sale itself, the vendee is owner but has no possession; he has, however, a right to the possession, unless there is something which prevents his asserting that right; the vendor is no longer owner but remains in possession of the goods until delivery takes place.

Now, gentlemen, what do you mean by "possession"? I shall never forget a case in which two very learned counsel, who had been looking up the Roman Law, came with a mass of phrases to the trial of a case in which a landlord complained that his tenant's brother, after he had distrained, had removed all the goods. It was simply an action of trespass. Oh the phrases! oh the weariness! and oh the impatience of Mr. Baron Martin, who tried the case! At four o'clock he disposed of the business in about five minutes. I want to give you his summing up to teach you some of the meaning of this word "possession." "Gentlemen, if you think that this man, the landlord, had a claim of £40 for rent, and you cannot doubt he had, he was entitled to enter on the demised premises in the ordinary way and make the goods found there, with some few exceptions, available for his rent. He tells you he went into the dining-room and said: 'I make all the goods here available for my rent.' I tell you if he did that, even if he did not touch one of the things, he was in possession of all the goods in that room, as much as I am in possession of this book I hold in my hand. But they say he abandoned possession because he went away to find a valuer. Gentlemen, do you think he abandoned possession? You can abandon possession by intention, but you can keep it by intention. I am now as much in possession of the goods in

my house, as when I left it this morning. I cannot so readily defend my possession of the goods in my house whilst I am here, as when I am at home; but the nature of my possession is not in any way changed because I am away from my home. Do you think the man did abandon possession? When he found the goods had been taken away, he did, what he had no right to do, he locked up the defendant who removed them. Gentlemen, consider your verdict." In three minutes the case was all over, with a verdict for the plaintiff. Gentlemen, I want you to understand, you need not touch the thing in order to be in possession of it. You know in the case of a gift of personal chattels there must be delivery of them to the donee, unless the gift is by deed. Suppose you call your laundress up into your room, when you are moving, and, putting the things you intend to take away on one side, you say to her, "You can have the other things I do not want," and she says, "Thank you," she is, without anything more, as much in possession of the things I gave, as if she had touched every one. So, with respect to possession, when contract of sale is being discussed, it is not necessary to touch the goods; if they are placed in the physical control of the purchaser, and he intends to keep them, he is in possession. May I give you an illustration to explain my view of possession, because it is important you should have clear views of possession? If a man comes into my home to visit me, and puts his hat in the hall, I have no possession of his hat, not in the slightest; he is in the possession of it; I have nothing to do with it. He enters into my room and sits at my table; he has physical control of the fork he uses; but no possession; because he does not intend to keep it; he has only permission to use it. I hand to a man the keys of a chest standing in my room in order that he may have the things contained in it. As soon as he takes from me the key with the intention of taking the goods, he is in possession of all the things contained in

the chest, although he may not know its contents and may never have seen them. He has the control of the goods and intention to keep the control. He has possession, actual, real, not as sometimes is said, symbolical or fictitious. I define possession for the English Law by saying, if a man has physical control with intention to hold, he has possession. Do not forget that, in reading the Roman Law, you must bear in mind, that the Roman Lawyers did not, and could not, allow a bailee to be deemed to have possession: it was the intention to hold as his *own* that formed an element of their notion of possession; but in English Law a carrier has possession of the things delivered to him, to be carried; the woman who takes in the things to be washed, has possession of them; she has no property in the things, but she is going to hold them for a time, and it may be, and I think, she could maintain an action for any injury or damage to them, because she will have to answer to the person from whom she received them. Therefore do not be troubled with the fact that in the English Law a person may be in possession although he only intends to hold the goods for a short time, nor be troubled by what you read in Roman Law of the difficulty there was of property or possession being acquired by one freeman for another, when such freeman was not within the *patria potestas* of the other. In English Law no difficulty of that kind arises. Any person, a married woman or an infant, can take possession for you. I ask my neighbour, if he is driving up to town, to call at a house of business and get some things for me. The moment he has got them, they are in my possession, although I do not know of his getting them until he returns.

You will find possession of great importance when we come to the question of stoppage *in transitu*. Never forget that possession is *primâ facie* evidence of ownership, and that the true owner often founds his claim in Courts of Justice on possession. Do not trouble yourself with many subtleties about this matter

of possession. Where there is physical control with an intention to hold, you have possession, and that possession may be obtained either by yourself or by an agent. It is the great distinction between possession and ownership that you must keep in mind; for in a moment the vendor is only in possession; the vendee has become the owner; he may become possessed. Now another thing that you must apprehend, and carefully remember, is, that the vendor may part with his possession by an agreement, although there is no touching, or dealing with, the goods at all. If the vendor says, "I will hold the goods for you," you, the vendee, are in possession of them, although you may not have seen them; because, understand me, by the law of this country property may pass and possession be acquired without the goods being seen. I can say, "I will buy of you the horse of yours that won that race at Epsom yesterday for a £100." The subject-matter of the sale is specific; it is ascertained, and the property in the absence of a contrary intention will pass. "Will you hold it for me for a month and I will pay you for the keep?" "I will." Possession is taken; I am in possession; I have now the goods delivered to me, and an action for goods, not only bargained and sold, but sold and delivered, will lie.

It is very important for you to look at the cases, in which this matter of change of possession by agreement is discussed. The goods, sometimes, are in the possession of a third person, say a wharfinger, at the time of the sale; after the sale the vendor and vendee go down, tell of the sale, and say to the wharfinger, "Will you hold the goods for the vendee?" "Yes, I will." The moment he says that, there is a transfer of possession, although there has been no touching, no inspection of the goods and no act of any kind; a mere agreement creates the relation of bailor and bailee, between the vendee and the wharfinger. On such an agreement the vendee is in actual possession of the goods. You must

consider these things, because it may happen that, after the vendor has given his instructions to the wharfinger to hold the goods for the vendee, the vendee becomes insolvent; until the order is acted on and an actual agreement come to between the vendee and the wharfinger, there has been no parting with the possession by the vendor, and the vendor can recall the order, and is entitled, in respect of the goods, to exercise a right of retention analogous to the right of stoppage *in transitu*. *M'Ewen* v. *Smith*, 2 House of Lords Reports, p. 309.

Thus gentlemen, you now see that the moment that you come to consider the Act of 1893, and find the expression of transfer of property, in the definition of sale, it is necessary that these four great phrases, contract and conveyance, property and possession, should be discussed and understood.

Now, gentlemen, I propose, in the remainder of the time allowed to me, to consider the conditions under which property in personal chattels may be transferred to the vendee by contract and by contract only—without delivery of all or any part of the goods. Here, I must confess, that I should have looked for a little more explicit statement of the law than is found in the Sale of Goods Act, 1893. You will not read in that Act the statement that property in personal chattels may pass by contract *without delivery*, if you search it from one end to the other. The law relating to the transfer of property in goods by contract begins with a most curious sentence about unascertained goods, but there is no express statement that the property in goods may pass by contract *without delivery*. This is the thing on which I desire to lay stress. In the law of England you cannot go higher than this, that a contract of sale *may* transfer the property in personal chattels, the subject-matter of the sale. Whether it does or does not transfer the property is a question of the intention of the parties. Now it is a most unfortunate thing, I think, that whether the property passes by contract

only should depend on a question of intention. How much money was wasted in determining whether a testator had manifested an intention to change the order of taking his estates for the purpose of discharging his liabilities. It is very difficult sometimes to know whether this intention exists; but whether the property passes by contract only is entirely a question of intention. Then there is one rule, which you do not find in the Sale of Goods Act, and which I am going to place before you. I want you to examine the Act carefully and see if what I say is correct. I tell you there is one condition that must subsist, before the property can pass by contract of sale, and that is, that the vendor himself must have property in the thing he professes to sell. That is the first. Now this proposition is not, to my judgment, distinctly brought out in the Sale of Goods Act. Section 16 reads thus: "Where there is a contract for the sale of unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained." I say to the compilers of this Act, that no one has any property in unascertained goods, and that there is no information in telling me, that the property does not pass until the goods are ascertained: particularly when it is remembered that when they are ascertained, the property sometimes does not pass. What you want is this statement; that no property in goods will pass by contract of sale unless the contract attaches on specific or ascertained goods. You want this affirmative statement for your guidance. The first thing to determine is, has the vendor any property in the goods agreed to be sold, for unless the vendor has a property in them, it is impossible, except by way of estoppel, that any property can pass to the vendee. The vendor in a large number of cases has not in his possession or control the goods, with which he means to perform the contract. He hopes to acquire them in time to perform the contract. No doubt, two hundred years ago, nearly all sales were

of existing chattels, and some judges in the early part of last century thought a contract for the sale of future goods was void. Such a doctrine is no longer held, and a sale of future goods is perfectly valid. Again, a vendor may have no property in the goods sold, even although he owns the things by which they are to be produced or the contract fulfilled. I will call your attention very shortly to some cases which you may read with advantage. I may be wrong, but according to my view, if a man is the owner of an estate in fee simple he is not the owner of a single tree standing upon the land or of any of the bricks in the wall which guards his estate, or even of the wall itself. There is no individuality in these things. He will, if anybody should enter and cut down the tree without justification, be entitled to maintain an action for the injury done, and perhaps obtain an injunction to prevent its repetition. When he has cut down the tree he has property then in the tree itself, and if the entire tree is the subject of sale and all the other conditions are fulfilled, the property in the tree will, without delivery, pass to the vendee, who may have purchased it. I will test my proposition by a case. I want you to follow me. Supposing a man comes on my estate after I have felled a dozen trees and agrees with me to buy of me that portion of the trees which is between 8 inches from the bottom of the trunk and 10 feet from the bottom of the trunk—that is, a portion of each tree of 9 feet 4 inches in length; if nothing more has taken place, I can say at once, that no property in that, which the vendee has agreed to purchase, has passed to the vendee, because I can say at once the vendor has no property in it. This decision is quite apart from the rule of something remaining to be done by the vendor to the goods sold to put them in a deliverable state. The vendee will be entitled to call upon the vendor to fulfil his contract, and it may be by the threat of an action for damages, or otherwise, compel

him to separate the portions sold; but until actual separation takes place there is no property in the thing sold in the vendor and none that he can transfer; and therefore, if you take my view, you will never have any difficulty in dealing with some of the cases to which I may have to refer. In support of this view let me give you one case to-night, because, it may be, my discourse will not be deemed learned, unless I give you a case. I call your attention to the case of *Acraman* v. *Morrice*, which is to be found in 8 Common Bench Reports at page 449. In that case the plaintiffs were the assignees of a bankrupt named Swift, who dealt largely in timber in the south-west of England; and Swift having felled some trees, the vendee, Mr. Morrice, desired to buy a certain portion of them. Mr. Morrice sent his agent (do not forget this) to inspect the trees and to measure and mark off such portions as were suited for his purpose. The portions were marked and measured by the agent and the defendant agreed to purchase such portions. The vendor actually sent the trees to Hadnock, the place where they were to be got ready for delivery. The unfortunate vendee paid all the purchase money. The portions Mr. Morrice purchased had not been separated. All this took place in 1847, but as individuals will get into difficulties as well as nations, a *fiat* in bankruptcy against Mr. Swift was issued in April 1848. The trees which had been felled, had not been lopped and topped. Poor Mr. Morrice, having parted with all his money, thought he had better make an effort to save himself. Under his instructions, his men went and cut up the timber according to the marks and measurements, and took away those portions he had agreed to purchase. The assignees brought an action of trover against Mr. Morrice to recover the value of timber he had removed. With the principle I have suggested, you have no difficulty in deciding whether in this case the verdict should be for the plaintiff

or for the defendant. The portions of the trees themselves which Mr. Morrice had purchased had no individuality, and no one had any property in those parts which were the subject of the sale. The property in the trees, of course, was in Mr. Swift, and subsequently in his assignees, but those portions which were to be cut and severed were not the property of any one. As Lord Ellenborough said, until you have individuality you cannot have property, and the Court of Common Pleas decided, that the assignees were entitled to the trees, which had not ceased to be the property of Mr. Swift, and, of course, with the trees, all those parts or portions of them which Mr. Swift had agreed to sell. Read the case of *Acraman* v. *Morrice*, and you will find that although there was inclination to decide the case on the ground that something remained to be done by the vendor to the property, the Court decided that the vendor had no property in the parts, and that a man cannot by contract or any other way become the separate owner of an undivided portion of a chattel.* I do not thank anybody for telling me that if there is a contract for the sale of unascertained goods; no property in the goods is transferred until they are ascertained. Goods do not become even the property of the vendor until they are ascertained, although he may have the means of making clear and definite and transferring what he has sold.

I purpose on the next occasion to make a rapid examination of some of the principal cases showing the conditions under which property passes to the vendee without delivery and then to enter upon the discussion of the provisions of our law as to the evidence and proof of the contract of sale.

* Reading *Acraman* v. *Morrice* again, since my lectures were delivered, I think the statement as to the *ratio decidendi* of that case, is put too strongly in favour of my view. I still think the decision may and ought to rest upon the principle I have enunciated.

LECTURE II

CONDITIONS OF PROPERTY PASSING

GENTLEMEN,—As some may be present to-night, who were not here on the last occasion, I may be permitted to state that I pointed out in my last address, that the definition of "contract of sale" in the Sale of Goods Act, 1893, requires an explanation of four legal conceptions, namely: contract, conveyance, property and possession. The definition of "contract of sale" in the Sale of Goods Act which all students and lawyers must accept, introduces the student at once into the consideration of a very important but difficult question, namely: when does the contract of sale transfer, without delivery, the property in the goods sold? I stated that I should prefer a definition which pointed only to the delivery of the thing sold, because delivery is that which all sellers contemplate and buyers look for. When delivery is effected (as delivery is one of the methods of conveyance of personal chattels) the property in the goods or things sold, if the vendor is truly owner, and in some cases where he is not, passes to the vendee. In almost every sale of goods there is, at the time of its formation, a promise to deliver. An intention of transferring the property otherwise than by delivery is, I think, rarely present to the mind of the vendor or vendee. If you attend to what passes at any purchase of goods, you generally hear the question: "When do you want delivery?" or, "When will you take delivery?" or, "When shall I forward them?" or "To what address shall I send them?" In the definition

of a contract of sale, in the Sale of Goods Act, you have a reference to what is scarcely ever expressed, and an omission of that which is expressed or implied in almost every contract of sale. Besides delivering the goods, the seller also promises, if you look at section 12 of the Sale of Goods Act, that the buyer shall have and enjoy quiet and undisturbed possession of the goods delivered, together with a warranty of title. More than this, the buyer can scarcely expect and seldom looks for. The definition of a contract of sale as I would give it, should have no reference to the transfer of the property, but only to the delivery of the goods, and, as I told you, by the law of England the property in goods sold may pass by contract of sale without delivery, I would treat of this doctrine separately and by itself. By confining my definition to the delivery, the student would readily comprehend the definition of "Sale" and pass quickly thence to the mastery of a large portion of easy and simple law before being called upon to deal with the difficulties which attend the transfer of property by contract without delivery. As however property and not delivery is mentioned in the definition in the Sale of Goods Act, 1893, and as in lecturing on the Sale of Goods Act I told you I could not ignore that definition, I felt myself obliged in order to an exact understanding of the definition to begin with a discussion of the meaning of contract, conveyance, property and possession. The meaning of these phrases I presented in a rough outline to you in my last lecture, and began a discussion of the circumstances under which the property in the goods sold will pass by the contract itself, without delivery. I told you that whether the property passes by the contract itself depends upon the intention of the parties, and that in the absence of the expressed intention of the parties the law itself provides certain rules for creating, if I may so speak, an intention for them. I stated that whatever the intention of the parties might be, there

was one condition which, from the nature of things, must be fulfilled before property can pass by contract of sale without delivery, namely, that the contract must attach on specific or ascertained goods either at the time of the formation of the contract or subsequently thereto. I told you that this affirmative statement is not to be found in the Act of 1893, and that its statements with reference to the transfer of property by contract of sale without delivery are commenced by a statement of scarcely any value and in part misleading. This is what it says: "Where there is a contract for the sale of unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained." I told you that statement was of little use, because no man can have property in unascertained goods, neither vendor nor vendee; I am not speaking of cases of estoppel, to which I shall hereafter call your attention. I told you this, that no man has property in unascertained goods. A man may agree to sell unascertained goods but cannot, at the time of the contract, pass any property therein. A man may agree to sell goods not in existence, but which he hopes to procure; but the contract cannot, from the nature of things, pass any property in such goods; and even when the goods are procured by the vendor, and the goods are such as the vendee is bound to take, even then the property in the ascertained goods does not vest in the vendee until by agreement, or the consent of both parties, the contract attaches upon such ascertained goods. I also told you, that the goods may be unascertained in my view, although in one sense the goods are before the vendee, and he can see the material out of which the contract is to be performed. As an illustration of this statement I called your attention to the case of *Acraman* v. *Morrice*, in 8 Common Bench Reports, p. 449, in which the Court decided that the property in parts of some trees which

had been felled, and which parts had been marked out by the vendee and bought by him, could not, prior to severance pass to the vendee; the contract did not attach upon specific or ascertained goods. The moment however that the severance is made, in my view, the contract attaches upon specific and ascertained goods. It does not follow even then, that the property will pass, for I shall hereafter have to show you that by the law of England, in the absence of any express intention of the parties, if the price of the goods is to be ascertained by measurement, no property passes until the measurement has taken place. In my opinion therefore, it may be misleading to state that on the ascertaining of the goods, on which the contract is to attach, the property in the goods will then pass to the vendee. In the case of *Acraman* v. *Morrice*, 19 L. J. C. P., p. 59, I ought to call your attention to a very pertinent question that was put by Mr. Justice Maule in support of the view I presented to you, that the vendor himself owns the distinct chattel, the tree, and until it is cut up and severed he does not own the tree and some unascertained portion of it; he owns the tree and the tree only. Mr. Justice Maule put this question: "You say that immediately on the sale, the marked parts of the trees became the chattels of the defendant? Is there such a thing as a tenancy of a specified quantity of an undivided chattel?" I think the answer to the question is that there cannot be. Although it may be contended as Chief Justice Wilde did that the reason why the property did not pass in the parts of the trees was because something remained to be done to the subject-matter of the sale, I think the true ground is that neither the vendor nor vendee had any property in the subject-matter of the sale until a severance took place. I shall call attention soon also to another condition of the law of England, that even where the goods are ascertained, if something is to be done to the goods themselves to put them in a deliverable state, in the

absence of the express intention of the parties, the property in the goods will not pass until the goods are put into a deliverable state, in conformity with the contract. In the case of having to measure the goods in order to ascertain the price to be paid, the property in the goods will not pass, in the absence of a contrary intention, until the measurement has taken place.

Upon this principle, however, of the vendor having no property in certain goods until separation, I think the Court of Common Pleas proceeded in the case of *White* v. *Wilks*, in 5 Taunton, p. 176, to which attention may be called. Wilks agreed to sell to Shuttleworth and another twenty tons of oil out of his stock, consisting of several large quantities of oil, in different cisterns. The vendees became bankrupt before any separation of twenty tons had taken place, and the assignees brought an action of *trover* against Wilks for the twenty tons of oil he had agreed to sell. The Court decided that the assignees of the vendees could not maintain an action for the conversion of the oil—that is, could make no claim as owners, because the contract had not attached upon any specific or ascertained parcel of oil. This question arises again thus: here is a barrel with oil in it; it is more or less full. The owner himself has a property in all the oil, that is in the barrel, but, according to my view, he has no property in anything except the whole of it. If five gallons were to leak out, he would then be the owner of the oil which is in the barrel and that which is on the floor. Also if any one should either rightly or wrongly separate the oil the owner would have the property in the two portions, and each of them. If I remember rightly, it was on this ground decided that the landlord who found on the demised premises only a barrel of wine, which contained more wine, if sold, than was sufficient over and over again to pay the rent, could not be made liable for an excessive distress because he seized and sold the whole of the wine. There

was only one piece of property the landlord could seize, namely, the wine in the barrel, and not any one, three or ten gallons which might have been sufficient to pay the rent. It may seem paradoxical; but the owner of the wine in the barrel may agree to sell a portion of it, and he will enjoy the benefit of the whole, but in my view he has, for the purpose of conveyance, property in the whole wine which is in the barrel, and until it is separated and can be said to consist of two portions, he has the property in the whole, and that is the only property he has. He will have the full enjoyment however of every part of it. It seems to me clear that before the contract can attach upon specific or ascertained goods the particular portion of the goods that is to belong to the vendee must be ascertained.

There is a case to which your attention must be called because it seems to run counter to the principle I am presenting and you will carefully read it, and with it the comment of Lord Blackburn in his book on "Contract of Sale." The case is *Whitehouse* v. *Frost*, in 12 East, p. 614. In that case J. and L. Frost had purchased of persons named Dutton and Bancroft ten tons of oil out of a quantity of forty tons, contained in a cistern, which Dutton and Bancroft owned. Before any separation of the ten tons, Frosts sold the tons they had purchased to a person named Townsend; Frosts gave to Townsend a delivery order, on Dutton and Bancroft for "the ten tons of oil we purchased from you." Dutton and Bancroft wrote across that order when presented to them by Townsend the words "Accepted. Dutton and Bancroft." It may be the decision is justifiable on a matter which arises out of that acceptance of the order by Dutton and Bancroft. Townsend became bankrupt and the assignees of Townsend brought an action of *trover* founded on a claim of ownership, not only against J. and L. Frost, Townsend's immediate vendor, but also against Dutton and Bancroft, who, at the instance of

Frosts, had subsequently to the bankruptcy refused delivery. The Court of King's Bench held that the plaintiffs, the assignees of Townsend, the purchaser from J. and L. Frost, were entitled to maintain the action. Mr. Justice Bayley said, that on the purchase of the ten tons by J. and L. Frost from Dutton and Bancroft the property in the ten tons, although no specific quantity of ten tons existed, passed to the Frosts. I cannot think that such statement is good law to-day or that any one would accept it. You will find in the case of *White* v. *Wilks*, to which I called your attention, a direct dissent on the part of the Common Pleas from the view of Mr. Justice Bayley. Lord Blackburn points out that he thinks the decision can only be maintained on the ground that J. and L. Frost were estopped from saying they had not ten specific tons in their possession ready for delivery. It would seem also that the claim of the assignees against Dutton and Bancroft was a perfectly good one, as, after the acceptance of the order, they were estopped from denying that they held ten tons of oil for Townsend. If that is the true ground of the decision, it does not interfere with the doctrine I have mentioned, and you will find, subsequently, one of the judges who took part in the decision of *Whitehouse* v. *Frost* trying to sustain it on the ground, that what Frost sold was an undivided portion of the forty tons. "In the reported case," says Lord Blackburn, "no mention is made of there being any proof whatever of the agreement being to sell not ten tons out of forty but an undivided fourth part of every portion of the forty tons." It appears plain to me, notwithstanding the case of *Whitehouse* v. *Frost*, that where the goods sold are part of a larger mass and have no individual existence, no property will pass to the vendee by the contract itself.

Let me give you another illustration before I pass on, because I think you must read these cases, and I shall give you my view of them for what it is worth. I have

never regarded the case of *Rugg* v. *Minett*, 11 East, 210, as a case in which the property did not pass because something remained to be done to put the thing sold in a deliverable state. I do not think anything is going to be done to the property to put it into a deliverable state when you intend to separate it into two or more parts. In that case the defendants as prize agents to the commissioners for the care of Danish property put up for sale by auction twenty-seven casks of turpentine, and in the catalogue they were numbered from 28 to 54 inclusive. The casks all contained oil of turpentine, but of uncertain quantity, and the auctioneer said, "I am going to sell every one of these casks as containing 10 cwt. 3 qrs. 26 lbs." Now, not one of these casks held 10 cwt. 3 qrs. 26 lbs. in it. He said, "I shall sell the last two lots as uncertain quantities and the preceding lots will be filled from these." The plaintiffs purchased all the lots of the turpentine with the exception of three, and they were also the purchasers of the two last lots, from which all the lots without exception were to be filled up. The plaintiffs paid £200 to the auctioneer as a deposit, and subsequently £1715 to the defendants. A fire took place in the defendants' warehouse, which consumed the whole of the turpentine knocked down to plaintiffs; but before the fire took place all the casks had been filled up with the exception of ten. Each purchase at the sale by auction was regarded as a separate contract, and the Court held that with respect to every one of the casks filled up and made to contain 10 cwt. 3 qrs. 26 lbs. the property had vested in the vendee. He was, therefore, to sustain the loss of the turpentine in the casks which had already been filled up; the contract had in respect of them attached upon specific or ascertained goods; but as the vendee had paid all the money beforehand he was entitled to have so much money returned to him by the vendor as answered to the ten which had not been filled up and with respect to which the property had not passed. Some of the judges say there remained

something to be done to the oil by the vendor. It may be that is the proper way of looking at the matter. According to my view, the vendor himself had the property only in the turpentine in each respective barrel; he had no property in 10 cwt. 3 qrs. 26 lbs. of turpentine in each barrel sold. It is not until the barrel is filled up, that there is a specific or ascertained chattel on which the contract can attach.

One other case to which I desire to draw your attention. Do not adopt my view because I present it. I want you to examine these things for yourselves, and to adhere to your own opinion. Even if you are mistaken when you are in Court, you perhaps will still assist the Court by the presentation of your own, though mistaken, opinion, and the Court will guide and direct you to a right conclusion. The case to which I refer is that of *Busk* v. *Davis*, in 2 Maule and Selwyn, p. 397. In that case the vendor had a large number of mats of flax from Riga. He agreed to sell ten tons of them. In my opinion he had no property in any ten tons of them. He had a property in each mat, and if you like to count them he has the property in so many mats. To make the ten tons, it may be necessary to break up some of the mats, and this must be done before the ten tons can be ascertained. A fire took place before the ten tons were ascertained, and the Court held that the whole loss must rest upon the vendor. Do not trouble yourself about loss, because if once you have the owner, as a rule, unless there is a contract imposing a different obligation, the person who is the owner must run the risk and bear the loss. There it was held that the property in the mats had not passed to the vendee. According to my view nothing was to be done to the property but only an act done for the purpose of getting specific or ascertained goods upon which the contract might attach. You will read these and other cases; read them all. You will find them all collected in such a work as Benjamin on Sale. I do

not want to say much of myself, but having read Lord Blackburn's little book thirteen or fourteen times, I may, perhaps, justly ask you to apply some of your spare hours in close devotion to the study of these and other cases, in order that you may rightly determine when the property in personal chattels passes by contract of sale without delivery. The first thing is, there must be specific or ascertained goods on which the contract attaches.

The next thing I want to state to you and to bring out clearly before you, as far as I can, is this; the contract may attach on specific or ascertained goods either at the time of the formation of the contract or subsequently thereto. In the interpretation of terms in the Sale of Goods Act, "specific goods" mean goods identified and agreed upon at the time a contract of sale is made. This definition, in my opinion, is too narrow. I once had the privilege of appearing before a judge who, having passed a great deal of his time in patent cases, had then come freshly to the discharge of Common Law duties. I said to him in an interpleader, "My Lord, I claim the property in the goods for my client either because the property vested in him at the time of the contract, or by the subsequent appropriation of the goods to the contract with the consent of both parties, or by the election of the vendor conferred upon him by the contract." He said smiling, "Is it necessary to introduce the doctrine of election? will not one of the other two do for you?" I said, "One will do, but I must not give up any one." Just keep these things in view; first, the contract may attach on specific or ascertained goods at the time of the contract being made. If you want authority for that proposition take *Tarling* v. *Baxter*, 6 Barnewall and Cresswell, p. 360. I want you to look at this case because there are some conditions forming part of the contract. I think that the property may pass by a contract of

sale, although there are conditions as to the delivery. This case is important for you, as showing, that the question whether the property passes does not depend entirely upon the words people may use; the words they use are of importance, but they do not conclude the question. In *Tarling* v. *Baxter*, on January 4, 1825, Baxter agrees to sell—mark these words, because in the Sale of Goods Act you have the words "sale" and "agreement to sell," and "sale" is used where the property passes. In this case Baxter agreed to sell and Tarling agreed to buy, what?—a hay stack, for the sum of £145. The parties had seen it and it was what they had agreed for; the contract attached upon specific or ascertained goods. Tarling was to pay for the hay on the 4th of February next and it was to remain on Baxter's field until the following May, the hay not to be cut until paid for. Soon after the contract was made, on the same day, Baxter drew on Tarling a bill of exchange at one month for the price, which bill Tarling accepted. The hay stack was burned without any fault of either party on the 20th of January. Tarling paid the bill at maturity and sought in the action to recover back the money he had paid. The Court held that the vendee must bear the loss, because the property in the hay had by the contract vested in him, and that if the plaintiff had not accepted and paid the bill, an action for goods bargained and sold could have been maintained by the vendor. It is very important to remember that, if you can maintain an action for goods bargained and sold, you can get the whole contract price. If you cannot and are obliged to bring an action for damages, the damages may vary. It was held in this case, that although the vendee was not to have the stack without paying for it, yet the contract had attached on specific or ascertained goods and, there being no intention to the contrary, the property in the hay passed immediately to the vendee, although the stack was still standing on the vendor's land. This

is a case in which the property passed at the formation of the contract.

Now, let me give you a case, in which the property passed, by what is called subsequent appropriation. A useful case is *Rohde* v. *Thwaites*, in 6 Barnewall and Cresswell, p. 388. That was a case of a sale of sugar. The sugar is all lying on the floor in the plaintiff's warehouse. "What will you buy, will you buy it all?" "No; I will take twenty hogsheads of it." There are no specific or ascertained goods, according to my view, at the formation of the contract. The buyer was not going to buy the whole, mark you; he was only going to buy twenty hogsheads; that is, that portion of sugar which will be found in the twenty hogsheads when they are filled. Four hogsheads were filled up and the defendant, the vendee, received them. Sixteen other hogsheads were filled in with the sugar, and the vendor sent a letter telling the vendee that the other sixteen hogsheads were ready and asking him to come and take them away; and the answer was either by letter or by word of mouth, "I will come as soon as it is convenient for me, and take them away." The Court held, that by that message coupled with the selection which the vendor had made in preparation for performing the contract, there was an appropriation of the sixteen hogsheads to the contract for twenty, by the consent both of vendor and vendee, and that the property in the sixteen hogsheads passed to the vendee and that an action would lie for the full price of the sixteen hogsheads as for goods bargained and sold. There you see is the case of property passing by appropriation subsequent to the contract, but mark you, you must have in such a case, the actual assent both of the vendor and the vendee to the appropriation.

Now take a case where the Court held that the property had not passed, because there was no assent, by the vendee, to the appropriation, *Atkinson* v. *Bell* in 8 Barnewall and Cresswell, p. 277, a case which is

often referred to. There a man named Sleddon had undertaken to make two machines for Bell, the defendant. Sleddon made them. He took every precaution. He did all he could to make them in conformity with his contract, sent word to Bell to tell him that the machines were ready for him, and sent him an invoice. Sleddon, the vendor, had done all he could to get the vendee to take the machines, and had himself set them apart as far as he could, to the use of the vendee. The Court held, that the assignee of Sleddon could not maintain an action for goods bargained and sold, because, although Sleddon had done all he could to appropriate the machines to the contract, there was no assent to the appropriation by the vendee; that there must be the assent both of the vendor and the vendee to the appropriation in order that the contract should attach upon specific goods and the property pass without delivery. The assignees could maintain no action founded upon the suggestion that the property in the machines had passed to the defendant. Read also the case of *Jenner* v. *Smith*, L.R. 4 C.P. 270.

Now let me tell you as to the property in the goods passing by the election of the vendor. This doctrine is of importance when you come to deal with the question of what is called the *jus disponendi* of the vendor, a phrase which has come up since I began to study the law forty years ago. The terms of the contract may confer on the vendor the right to make an election of the goods which shall be binding on the vendee. If the contract does confer on the vendor a right of election, as soon as ever the vendor has exercised his election by selecting the goods for the performance of the contract, no matter what evidence may be required of it, the property passes to the vendee. Remember the election is exercised once and for all. This doctrine elucidates a case which troubled me very much when I first began to study the

law, namely, *Fragano* v. *Long*, in 4 Barnewall and Cresswell, p. 219. In that case an order was sent from Naples to a house of business in Birmingham for certain hardware goods, with instructions to effect an insurance upon them and despatch them. They were to be paid for on arrival. What did the Birmingham manufacturer do? He apparently made or procured goods answering to the contract. I want to tell you what is sometimes forgotten, that the person who makes the election must exercise his authority; therefore he must select such goods as the vendee is bound to receive, and if he does select those goods, and they are delivered, apart from the question of the Statute of Frauds, of which I shall hereafter tell you, it has been long settled that the vendee must keep the goods if they are such as he ought to accept; and an action will lie against him for goods sold and delivered, although he should repudiate the goods the moment they arrive. In *Fragano* v. *Long* it was held, when the manufacturer despatched the goods and effected the insurance that the goods became the property of the vendee, because you see, the vendor was to do some act by virtue of the contract, which could only be done after he has selected the goods; he is to effect an insurance, and he is to despatch the goods. He can do neither one nor the other without first selecting the goods. He must select such goods as the vendee is bound to take, but the contract itself confers on him the authority to select the goods. The moment he has selected the goods, the property in them passes to the vendee, whether they are in his possession or not. In the case of *Fragano* v. *Long* the goods were sent to Liverpool and the insurance effected, and while being put on board the vessel, through some carelessness of the mate or some other servant of the owner of the vessel, the goods fell into the water and were lost. It was held that Fragano at Naples, who had never seen the goods, and never had control of them, could maintain an action of negligence against the ship-owners

because he was the owner of the goods, by virtue of the exercise of the authority he had conferred on the vendor.

You now see these three things: an appropriation at the time of the contract, or subsequent thereto, or by the election of the vendor; they are very important matters for your consideration.

We are told in the Sale of Goods Act of an unconditional appropriation. I do not think that there can be any such thing as a conditional appropriation. Either the parties have agreed to the appropriation or they have not. Do not forget this, that until the vendor has made an appropriation with the assent of the vendee or has made his election, the vendor can part with the goods on any terms he pleases, either to the vendee or any other person. That is my view, because he is still the owner. The vendor may be liable to an action for breach of contract for not performing his contract, but as long as he has not parted with the property in the goods, he can deal with them as he pleases—sell them to somebody else or impose any conditions he pleases upon the delivery of them to the vendee. Hence I desire you to read the judgment of Mr. Justice Willes in the case of *Godts* v. *Rose*, in 17 Common Bench, p. 229. In the course of the case there was a great deal of discussion about the terms of the contract and other matters. I do not think it worth while to discuss the terms of the contract; it was not a sale of specific and ascertained goods. The goods, eleven pipes of oil, were in the possession of a wharfinger. The clerk of the vendor, under his instructions, took a notice of transfer from the wharfinger to the defendant, to the house of business of the defendant, and said, "Please, sir, I have brought you the notice of transfer, an invoice and receipt for the amount, but master wants a cheque in exchange." Suppose it was a term of the contract that the cheque should not be asked for. What did the vendee do? He kept the delivery order and refused the cheque,

saying the vendor was not entitled to be paid until fourteen days after delivery. The Court held that there was no assent to the appropriation; that, therefore, the property had not passed and it did not matter what the contract was. This was an action of *trover* against the vendee, who had got possession of the goods by the improper use of the notice of transfer. So you see in this case, there was no assent by the vendee to the appropriation, and if the property has not passed (bear that in mind) the vendor can part with his property on any terms he pleases and impose any conditions he pleases. Whether he may not thereby break his contract is quite another matter. Mr. Justice Willes said: "I am of opinion the plaintiff is entitled to recover, whatever construction may be put upon the contract. I do not rely upon the construction of the contract nor upon the colour given to it by the evidence at the trial. Until both parties have assented to the appropriation of some particular goods, to satisfy the contract, the property in them does not pass. Here there was no such assent to the appropriation of this particular oil; and, therefore, no property in it ever passed to the defendant."

I think it well to call your attention at this point to what is called the *jus disponendi*. If the property has passed to the vendee, as I told you, by the peculiarity of the English Law, it might, the right to the possession accompanies the ownership. If the vendee is owner, although he has never had the goods in his possession he may maintain either trespass or *trover* in respect of them; therefore, if the property in the goods has passed and the vendee is entitled to the possession, the vendor cannot have any *jus disponendi* in respect of the goods. If the vendor has not parted with the property he does not need any *jus disponendi;* he may deal with the goods as he pleases by virtue of his ownership. Let me illustrate this teaching by what I have seen in business myself. "Can you let me have fifty pieces

of ribbon of that particular quality and pattern?" "I think I can, sir." Fifty pieces are brought down and put upon the counter. The buyer says, "They are not quite like the pattern, but I think they are as near as anything I shall get. I will take them." The customer says, "What are your terms?" "Three months' credit." "I will take them on those terms." Then, sirs, the contract has attached upon specific goods and the property in them, there being no contrary intention, has vested in the vendee, apart from delivery. As the vendor has no lien, because the sale was on credit, the vendee is entitled to have the possession of the goods as against the vendor and as against anybody in whose hands he may find them. If the vendor thinks fit to put them in the hands of a carrier, and says to the carrier, "Do not deliver the goods until the consignee pays for them," in my opinion the buyer is entitled to maintain an action of *trover* against the carrier who refuses to deliver the goods to him unless he pays for them. Keep this rule in mind, as it has a most important bearing on the question of *jus disponendi*, and Lord Blackburn distinctly points out, that with respect to the *jus disponendi* the real point is the same, whether the person, into whose hands the goods are put, be a carrier by land or a carrier by water. Of course, the *jus disponendi* more frequently happens in the case of carriage by water because the goods are being sent to a distant land and the vendor desires to be protected. Now take the next case. The head of the department says: "I am sorry, sir, I have nothing like your pattern; but I am in communication with Lyons, and I will have fifty pieces like your pattern to show you next Monday." If he likes, the customer may give an order. "Very well, then, I will give you an order for fifty pieces exactly of that colour and pattern to be here next Monday." No property in the goods has yet passed, the contract has not attached upon any specific or ascertained goods.

The vendee comes on the following Monday. "Are the goods here?" "Yes, look at them." "They will do." The very moment that the buyer says that, the contract has attached on the goods by subsequent appropriation and the property, all things being equal, there being no other condition, has vested in the vendee. Now mark you, if the vendor thought when the fifty pieces came forward, "Well, really, I think I can keep the gentleman who gave me the order waiting for a couple of days, and here is a person who wants exactly the same goods; I can get fifty more from Lyons. I shall sell the goods that really were ordered for the first customer to the new customer." He does so; no action of *trover* or conversion will lie by the first vendee of whom I spoke; the vendor is still the owner of the goods until appropriated to the contract and can do what he likes with them; the moment, however, he shows the parcel of goods to the vendee and he approves of them, the property passes; that is, by subsequent appropriation. As soon as the property passes the vendor cannot dispose of the goods to any other person. Supposing the transaction between the head of the department and the customer is thus; the customer says, "I shall not be in town for another three weeks; I am sorry you have not got the goods I want; I will give you an order for the fifty pieces I want, and when they come will you please despatch them to me by Pickford?" The order is put in hand and the goods come forward. At present no property passes to the vendee, but the vendor looks at the goods and says, "Yes, those will do for the customer." It is the despatch by Pickford & Co. that he is to effect, which gives the vendor the right of selection; but I apprehend (and I want you to think upon it), subject to correction, that the moment the vendor has decided to appropriate those goods and appropriates them to the contract, the goods become then and there the property of the customer. If the customer is to have a three months'

credit, except in the case of his becoming insolvent, whilst the goods are *in transitu*, he is entitled to maintain an action of *trover* in respect of those goods, if the goods are withheld, either against the vendor if he refuses them or against the carrier in whose charge they may be placed. The vendor cannot impose on the vendee the obligation to pay for the goods at once, or impose any other term without his consent. I will show you hereafter how the claim may be affected by the vendor's lien or the right to stop *in transitu*. It is very simple as I am putting it to you, but it appears to me this explanation is requisite to make clear portions of the Sale of Goods Act and some of the books it is my privilege to read. The *jus disponendi* frequently arises in cases of sending goods by vessel or by steamer, and, as you know, the goods are generally sent under a bill of lading, signed by the master of the vessel. Then, if the property in the goods has not passed, the vendor may do as he pleases with respect to the vesting or disposal of the goods. If he places the goods on board a ship and by the bill of lading the goods are deliverable to his own order or that of his agent it is stated by sec. 19 of the Sale of Goods Act, that the seller is *primâ facie* deemed to reserve the right of disposal; it would be very strong evidence that he has intended to keep his control over the goods himself and can direct that the goods should not be delivered to the vendee until certain conditions are fulfilled. I told you that apart from the question of breaking the contract, the vendor may do as he pleases with his own goods and may send them forward on any condition he pleases. In these cases one thing you must do, you must look at all the circumstances and the whole transaction at once. It was in consequence of looking at each act or piece of conduct separately and drawing an inference from it, not waiting to draw the inference until the whole of the facts were before his mind, that the great judge,

Lord Bramwell, was led into error in *Browne* v. *Hare*, 3 H. & N. 484. I will on this question of the *jus disponendi* only call your attention to three cases. *Browne* v. *Hare*, 4 H. & N. 822, *Shepherd* v. *Harrison*, L. R., 5 E. & I. Appeals, 116, and *Ogg* v. *Shuter*, 1 Common Pleas Div. p. 47. I told you if the property has passed then, of course, it may be that the vendor can impose no conditions, but such as are in conformity with the contract; and you will notice in most of the judgments in the cases just mentioned the judges all begin with determining whether the property has or has not passed; the goods were purchased abroad; have never been seen nor approved by the buyer. If they are still the vendor's, and the Courts regard an agent purchasing in a foreign country for a principal in this country as a vendor, he may as owner impose any conditions he pleases. Everything depends on the intention of the parties and you must look at all the circumstances. Take, first, the case of *Browne* v. *Hare;* it shows you the importance of the question whether the property has passed to the vendee. The vendee there had only about twelve hours' opportunity for insuring the goods, which came from Rotterdam to Bristol. On the morning of the 9th of September he received in Bristol a letter dated the 7th, telling him the goods would be shipped on the 8th. The goods all went down on the evening of the 9th in the Bristol Channel. It was important to know who was to bear the loss. Browne, at Rotterdam, agreed to sell to the defendant Hare, a merchant of Bristol, twenty tons of oil, to be shipped free on board at Rotterdam, to be paid for by Bill of Exchange accepted by the defendant on delivery to the defendant of the bills of lading. Browne at the defendant's request shipped five tons on board the *Sophie*. He sent an invoice to Hare, stating the oil to have been shipped for account of the defendant Hare; but he took the bill of lading "unto shipper's order or their assigns," which, as you know,

looks more or less as if the goods were to be kept in the control of the party shipping. Directly after Browne had received the bill of lading, making the goods deliverable to himself and his assigns, he himself endorsed the bill of lading specially to the defendant, and sent it to him together with a bill of exchange drawn in accordance with the contract. The goods were lost before the bill of lading and the invoice and bill of exchange reached the defendant. The defendant on hearing the loss refused to accept the bill of exchange. Was he liable to pay for the oil? Baron Bramwell kept looking at each fact by itself, and said, "There was at first only an intentional appropriation by the vendor which did not pass the property; and when the vendor put the goods on board he did not intend to pass the property because he took the bill of lading to shipper or assigns; and when he once decided to have the bill of lading in that form, nothing could follow from his endorsing the bill of lading and sending it to the vendee when the goods were no longer in existence." What did the other judges of the Court of Exchequer say? "No, you must not look at each particular fact in that way; look at the whole of the circumstances and see what is the fair and proper inference to be drawn from them all." The Court of Exchequer and the Court of Exchequer Chamber held that the real question was with what intention did the shipper place the goods free on board? Was it with the intention of retaining a control over them and continuing to be owner, or with a view to perform his contract? The question was one of fact to be determined by a consideration of all the circumstances. The jury had found the goods had been put on board in performance of the contract. The Courts held that such a finding went to vest the property in the defendant, unless the mode of taking the bill of lading necessarily prevented the property from passing. The Courts said it did not—that the property passed to the defendant

when the goods were placed "free on board" in performance of the contract, and the defendant had to bear the loss of the goods. There was here no reservation of property on the part of the vendor, although the bill of lading was taken to shipper or assigns.

Shepherd v. *Harrison* introduces you to a case of reservation and one of a very important kind. In that case Shepherd, a cotton merchant of Manchester, had directed a firm in Pernambuco, Paton, Nash & Co., to buy certain goods for him. They were bought, and the invoice was sent to Shepherd; the invoice was made out "on account and risk of John Shepherd." A bill of lading was taken in the form "Unto order or to his or their assigns." The bill of lading was endorsed Paton, Nash & Co. They sent a letter to Shepherd enclosing the invoice, and in the letter it was stated that they had also enclosed the bill of lading. On the argument much was tried to be made of that statement, but with little advantage. The majority of the judges thought that the clerk had made a mistake in saying the bill of lading was enclosed. The principals apparently on reading the letter withdrew the bill of lading, without correcting the letter. The bill of lading, together with the bills of exchange which were to be accepted pursuant to the terms of the contract, were sent to George Paton & Co. in Liverpool as the agents of the house of business in Pernambuco. The two therefore came together, the bill of lading and the bills of exchange. The bill of lading was actually endorsed in blank by the house in Pernambuco, so that any one to whom the bill of lading was given could readily get the goods. George Paton in Liverpool forwarded to Shepherd both the bill of lading and the bills of exchange "to which we beg your protection." Shepherd did what, Lord Cairns said (he did not suppose Shepherd intended to do any wrong), a merchant of honour scarcely would do: he took possession of the bill of lading and refused to accept the bills of exchange. Upon the

question arising between Shepherd and the owner of the vessel, because the owner of the vessel, Harrison, refused to give the goods up to him, an action of *trover* was brought by Shepherd against Harrison. You will remember the Courts decided that Shepherd had no right to the goods; that as the property in the goods had not passed by the contract, the people in Pernambuco could say on what conditions they chose the goods should become the property of the purchaser. They had said that Shepherd was not to have the bill of lading without the acceptance of the bills of exchange; that as Shepherd had not fulfilled the condition there was no delivery to him of the bill of lading, and the goods never became his. Lord Cairns said, "in the course of business, men do not write like lawyers, and by simply saying 'My agent will give the bill of lading together with the bills of exchange for which I ask your protection,' there is a courteous but clear intimation that the vendee is not to use the bill of lading unless he accepts the bills of exchange." If the bills of lading are taken there must be an acceptance of the bills of exchange for which the contract provided. So, it was held in the Court of Queen's Bench, the Exchequer Chamber and the House of Lords; and in two of the Courts the judges did not call on the counsel for the defendant Harrison. The Courts decided that the true inference from the facts was that the property in the goods, which had not passed by the contract, had not passed by the shipment and were not to become the purchaser's until he fulfilled the condition on which the bill of lading was offered, although the bill of lading had been endorsed in blank and sent to the purchaser.

In the case of *Ogg* v. *Shuter* there was a sale of potatoes by a gentleman in France to a merchant in England, payment to be by cash against bill of lading signed by the captain. The potatoes were shipped free on board, in bags forwarded by the merchant in England. The bill of lading made the goods

deliverable to order. The vendor's draft for the price and the bill of lading, both come forward and were presented to Messrs. Ogg, the purchasers. They said, "Oh, there is a mistake about the quantity shipped; we will not accept the draft until the ship is unloaded and the exact quantity determined." On the discharge of the ship, the right quantity was found to have been on board. The draft, with the bill of lading, was subsequently presented to Messrs. Ogg, and payment was again refused. The defendant, as agent for the French merchant, then sold the potatoes, and Messrs. Ogg brought an action for the conversion of the potatoes, alleging that the property in the goods had passed to them and that they were entitled to the possession of the potatoes. The Court of Common Pleas held that the property in the potatoes had passed, and that the plaintiffs were entitled to the possession of them, but the Court of Appeal reversed its decision and held that, although the property in the goods might have passed, as long as the condition on which the bill of lading, making the goods deliverable to order, cash against bill of lading, was unfulfilled, Messrs. Ogg, the purchasers, could not maintain *trover* against the defendant who had sold and disposed of the goods.

I hope that what I have said to you to-night on this point of the *jus disponendi* and the study of the reports of the cases to which I have called your attention may assist you in the examination of the provisions of the Sale of Goods Act relating thereto. I trust it will. Give me your attention while I conclude this subject of the transfer of property in personal chattels by contract alone, because I must enter on a fresh subject in the coming address. Remember, I told you, whether the property passes depends on the intention of the parties, but if there is no intention expressed, the law by certain rules does provide in some cases an intention for them. Thus, if there is no express or implied intention, although the contract has attached upon specific

and ascertained goods, the property in the goods will not pass to the vendees, if the goods are not in the state or condition in which they ought to be for the purpose of delivery under the contract. Suppose for example you purchased 100 dozen hats—panamas, if you like—all in the rough. They are to be stiffened, blocked, lined and ribbon put round them by the vendor. Then the goods at the time of the purchase are not in that state in which they are to be, when delivered. In the absence of any intention to the contrary, the law presumes that until the goods are put in a condition fit for delivery, the property in the goods is not to pass. If, however, there is an express or implied intention that the property in the goods is to pass before the goods are put into a state fit for delivery, the express or implied intention will prevail. Take the case of *Young* v. *Matthews* (2 Common Pleas, p. 127), a judgment to which Chief Justice Erle was a party. In that case, Young the assignee of a man named Moxon brought an action of *trover* against the defendant Matthews who purchased some bricks of a person of the name of Northen, who alleged he had bought them of Moxon. It appeared that Northen had been accepting accommodation bills for Moxon, a brickmaker. When the bills became due, as so often happens, the drawer could not find the money. Thereupon it was agreed between the agent of Northen and Moxon that Northen should buy certain bricks that were in a field belonging to Moxon, and thereby discharge his obligations under the bills of exchange. The bricks, which Northen purchased, were in three clumps; one clump of finished bricks, everything done ready for delivery; another clump in the course of burning; and a third clump that had only just been moulded. The Court came to the conclusion that as the agent of Northen knew it was most important that Northen should be secured, because Moxon was about to become a bankrupt, that what passed between Northen's agent

and Moxon amounted to this: "Will you hold these for my principal as they are, in this state?" "I will." "You will burn and complete them?" "Yes." It is clear, the goods on which the contract attached were specific or ascertained. There are two parcels, however, to which something is to be done by the vendor to put them in a deliverable state under the contract: the second clump is to be partly burned; and the third, to be wholly prepared and burned. Mr. Justice Byles said, from what passed between the parties, "I gather there was an intention to pass the property in the state in which the goods were at the time of the contract"; and the Court held that the property passed by the contract without any delivery, and that the assignee in bankruptcy had no claim to the bricks which were in the bankrupt's possession. There are some other cases as to the property not passing in the absence of the intention of the parties, where the goods are to be put by the vendor in a deliverable state. I hope I have said enough to guide you in your study of them.

Now let us take the case of the goods being required to be weighed by the vendor to ascertain the sum to be paid for the goods by the vendee. In such a case in the absence of express or implied intention to the contrary, the property in the goods will not pass until the weighing is completed. *Hanson* v. *Meyer* (6 East, p. 614) affords a good illustration of this rule. In that case Meyer sold the whole of the starch he had lying on the floor in a particular room. The contract attached upon specific or ascertained goods. It is not a sale of a portion of the starch—it is the sale of the whole. There is the parcel; you can see it. What does it matter how much it contains? I am buying the whole of the starch now lying on the floor. Does the property in the starch pass to the vendee? Stay, let us see. How is the starch to be paid for? It is to be paid for at so much a hundredweight; therefore, to ascertain the price, it must be

weighed by the vendor. Until weighed, in the absence of a contrary intention of the parties, the property will not pass. In *Hanson* v. *Meyer*, part of the starch had been weighed when the vendee became bankrupt; but 31 cwt. had not, and the Court held that, with respect to the 31 cwt., the property had not passed to the vendee; that until the starch was weighed there was no intention to pass the property. If it had been agreed between the parties in *Hanson* v. *Meyer* that the whole parcel should vest in the vendee, irrespective of the weighing, then the property would have passed immediately on the contract being formed. If the starch had been sold for a lump sum and the weighing was to be for the benefit of the vendee, in the absence of a contrary intention, the property in the starch would before weighing, vest in the vendee. You will read in conjunction with *Hanson* v. *Meyer* the case of *Turley* v. *Bates*, 2 Hurlstone & Coltman, p. 200, which shows that if the weighing is to be done by the vendee, the property in the goods sold may pass to the vendee before weighing. The same reasoning applies to the "measurement" of goods in order to ascertain the price. Now take the case in which the goods sold are to be counted, in order that the amount to be paid may be ascertained. In *Zagury* v. *Furnell*, 2 Campbell, p. 240, a man had a number of skins for sale, 289 bales of goat skins. He sold them at a certain price, £1 17*s.* 6*d.* per dozen. It was the custom of the trade for the seller to count the bales before delivery. After the sale there was a fire, and the whole of the skins were consumed before any counting had taken place. The Court held that the property in the skins did not pass to the vendee until the counting had taken place. Let me tell you that in this case also, where counting is necessary to ascertain the sum to be paid, the property may pass to the vendee before counting, if the parties declare their intention that it shall.

Gentlemen, there are many portions of the law

relating to the sale of goods I shall pass over quickly. On that portion which relates to the transfer of the property in personal chattels by contract without delivery I have been obliged to speak at some length. I thank you for your attention whilst I have endeavoured, to the best of my ability, to explain this portion of our law to you. You will find that as a consequence of property in goods passing by contract without delivery, our law is obliged to have rules establishing the vendor's lien for unpaid purchase money; a right of the vendor quite distinct from and in no way connected with the right of the vendor to stop *in transitu*. Remember, it is by reason of the property passing by contract without delivery, that the vendor's lien becomes requisite. Yet in the Sale of Goods Act, you will find a statement made, and one most misleading, that the vendor is entitled to a lien upon the goods for his unpaid purchase money, *notwithstanding* the property has passed. It is in consequence of the property having passed, that the vendor requires the lien; if it has not passed, he does not require a lien, and can have none on his own property. He can retain the goods and keep them by virtue of his ownership and deal with them as he pleases. I make this observation, lest, in your reading the statute, some doubt should appear to be cast on the propriety of some of the statements I have made.

Gentlemen, I thank you for your attention, and if I can assist you in your studies I shall be more than repaid.

LECTURE III

GENTLEMEN,—In the addresses which I have delivered to you, I have assumed the existence of a valid contract of sale. I now come to tell you how a valid contract of sale may be made, the manner of its formation, and the peculiar evidence of it, which, in certain cases, the law demands.

The contract of sale is made and completed by the consent of the parties to it. Neither by the common law of England, nor by any statute, is it required that the *contract* should be in writing. By the 4th section of the Sale of Goods Act, 1893, it is provided that a contract for the sale of goods above the value of £10 shall not be enforceable by action unless the buyer shall accept part of the goods so sold, and actually receive the same, or shall give something in earnest or in part payment, or that there be some note or memorandum in writing of the said bargain made and signed by the party to be charged thereby, or his agent thereunto lawfully authorised. This section is a re-enactment in substance of the 17th section of the 29th Charles II. cap. 3, and requires a writing only in the absence of certain other conditions, and the writing need be only a note or memorandum of the agreement.

Much of the law, relating to contracts in general, is applicable, of course, to the portion we are now considering, contracts for the sale of goods; and many of you no doubt have read some such elementary but

valuable work as that of the "Law of Contracts," written by a learned lawyer many, many years ago, John William Smith. You will find it there stated, as in every work on contracts, that the parties must agree to one and the same thing; they must be *ad idem*, in order that there should be a contract. It must be seen that the proposal on one side is accepted in the very terms in which it is offered. In Contracts of Sale, very often the proposal is made by the person who desires to become the buyer, as well as frequently, and in the greater number of instances, by the person who desires to become the seller; but, whoever starts the negotiation, the parties must agree to one and the same thing, and the final proposal which is made from one to the other must be accepted in the terms in which it is made.

Now, I have to tell you that a contract of sale may be formed, either by word of mouth or in writing, or partly by word of mouth and partly in writing, and sometimes it may be manifested either in whole or in part by the conduct of the parties. This statement is subject to the provisions of the 4th section of the Sale of Goods Act to which I have just called your attention. A contract of sale is sometimes described as an express contract; sometimes as an implied contract. The contract is express, whenever the terms of the agreement are set forth in language, or signs equivalent to language, as in printing or in writing. The contract may sometimes be implied; that is, set forth by conduct entirely from beginning to end, without a single word passing between the parties, who ultimately become vendor and vendee. I have made a contract myself and never uttered a word. Here is a person carrying on the business of a bookseller. I enter his shop. I see a book marked "10*s.* 6*d.*, net." I take it up and walk away with it. He will not charge me with stealing it because he knows I have been there before, and that I came for the purpose of buying. Upon evidence

of these facts being submitted to a jury, they would find that I had agreed to buy the book; first, because the plaintiff being in business and putting the book in the shop was a proposal to sell it to me; secondly, that my taking it was an acceptance of that proposal, and a promise on my part to pay the price that was marked on the book. Do just keep such a simple illustration as this in your mind, in order that you may never be misled by the use of the words "implied contract." An implied contract is a real contract, as much as any, the terms of which have been reduced into writing. An implied contract has all the elements of a real contract. If you have a fact or event, not being an agreement, which imposes an obligation, just as if the parties had agreed, such a transaction is now styled by English lawyers a quasi contract; thus money paid under a mistake of fact is recovered quasi ex contractu. It is important to remember that whatever be the method of acceptance, however it is manifested, it must be communicated to the other side; it is sufficiently communicated, however, if the person, to whom the proposal is made, at once begins to act upon it and assumes the transaction is binding between himself and the person who made the proposal. On this point you can read with advantage the case of *Brogden* v. *The Metropolitan Railway Company*, 2 Appeal Cases, p. 666.

I will now just call your attention to one or two rules that are of frequent application to contracts of sale. First, I would place before you this proposition: that wherever the contract has been reduced into writing, whether required by law or not, parol evidence of what took place either prior to or contemporaneous with the reduction of the contract into writing is inadmissible for the purpose either of adding to, or varying, the terms of the written contract. The Chief Justice, Lord Russell of Killowen, whose death we all deplore, may have rightly decided in *Gillespie* v. *Cheney*, 1896,

2 Q.B. 59, that, for the purpose of establishing the implied condition of section 14 of the Sale of Goods Act, evidence can be given of what passed prior to the time of the contract *being reduced into writing;* but he did not take it on himself to say that such evidence would be admissible to vary the obligations arising from the written contract. The decision would seem to show that parol evidence is admissible for the purpose of adding a statutory obligation to those which arise from the contract into which the parties have entered.

Take this proposition, too, that wherever persons enter into a contract of sale in a place or district where there are usages or customs applicable to the subject-matter of the contract, the parties are presumed to have contracted with reference to those usages, and those usages become part of the contract, unless they are expressly or impliedly excluded. Now I find people making a mistake about usages. You will hear people say: "Oh, usages; they must have existed from time immemorial, and they must not be contrary to the principles of justice." That may be very well, where the usage is to impose an obligation upon a party without his consent and perhaps against his will, but the usages I am speaking of are part of the contract into which the party enters. If the trade or business has only been in existence, say, for eight or ten years, and usages have arisen in that time, the usages may form part of the contract into which the person enters. Now, only one thing I want to guard you against; if the importation of usage into the contract is expressly excluded, there is no difficulty; the parties have said "usage shall not add anything to this contract," and usage is excluded. The difficulty arises when you have to determine whether the usages or customs are *impliedly* excluded. The only way, so far as I know, to determine that question, is by writing out clearly all the terms to which the parties have expressly agreed, whether they be in writing or by word of mouth; then,

on that paper, on which you have written out the terms of the agreement, add the usage, and then fairly and in good sense read the whole document through, and ask yourself whether the usage is inconsistent with any of the express provisions of the parties. If it is, then the usage is impliedly excluded: if not the usage will form part of the contract. If you have read Smith's "Law of Contract" you will remember that very simple, but still instructive, case of an agreement under a policy of insurance, that the insurance should continue on the goods until they were safely landed and on the ship until she was moored twenty-four hours, and evidence was offered to show that a custom or usage existed that the risk on the goods as well as on the ship continued for twenty-four hours. Put the express term of the contract and the usage together, and you will see, at once, the inconsistency of the express provision with the custom and you will arrive at the conclusion the custom is impliedly excluded. (*Parkinson* v. *Collier*, Park on Insurance, p. 47.) But there is one point which should ever be present to your mind: namely, that the custom or usage is impliedly excluded only by its inconsistency with the express terms of the parties, not with any inference of law therefrom. The forgetfulness of this rule led the Court of Exchequer to give a decision, which was overruled by the Exchequer Chamber, an error which I have found people fall into since in their practice and teaching. When you have the express terms of the contract you must not, for the purpose of seeing whether the usage is impliedly excluded, introduce as a term of the contract any inference of law from the express terms the parties have used. You must not draw your inference of law until you have the whole of the terms, and the usage, of course, if it applies, will be one of them—then you may draw the inference. For example, if I agree to sell goods to you and no time is mentioned for the delivery of the same, I am to deliver the goods within

a reasonable time. In a case in which there was a contract for the sale of shares to be paid for half in two months and half in four months, evidence was offered at the trial of a usage that in such a case the delivery of the shares should take place at the time appointed for payment. The learned judge said, "Let us look at the terms. A. buys, B. sells 250 shares at £12 10*s.* each to be paid half in two months and half in four months. How can you insert in this agreement a usage that the shares are to be delivered at the time of payment? From these terms there is an inference to deliver within a reasonable time. The obligation to deliver at the time of payment is quite inconsistent with the obligation to deliver within a reasonable time. The custom is impliedly excluded." The Court of Exchequer Chamber, with its calm wisdom, said, "Before you begin to draw your inference from the terms which the parties have entered into, first of all get the whole of the terms of the contract; when you have put in the usage as to delivery, there is nothing in such usage inconsistent with the express terms of the parties; when the parties have agreed that the shares shall be delivered at the time of payment, no Court of Justice can say there is an inference of law that they should be delivered within a reasonable time." Consequently the Court of Exchequer Chamber, in the case of *Field* v. *Lelean*, 6 Hurlstone and Norman, p. 617, decided there must be a trial *de novo*, because the learned judge at the trial erred in holding the usage was impliedly excluded by its inconsistency with an inference of law drawn by him from part of the terms, not the whole of the terms, of the parties.

I may state another little matter before I proceed, because you will find it in Lord Blackburn's work, to which you will be constantly referring, that in early times if persons agreed, as they generally did, for the sale of something that was present before them (because

orders for goods to be manufactured and sales of future goods were almost unknown), and the vendee was to pay for the thing in cash; if the parties separated without delivery or payment, there was deemed to be no contract between them. Now, in order to be in harmony with present manners and present customs, the contract would be deemed to exist, but there would be an implication to pay within a reasonable time and to deliver within a reasonable time. I proceed now to treat of a very important subject.

The first time that writing, in any shape or form, was required for the validity of a contract for the sale of goods, was the 17th section of the 29th Charles II. cap. 3; and as this section appears substantially in the Sale of Goods Act, it is impossible for an English lawyer, at least for me, to understand and apply the provisions of the Sale of Goods Act without referring to the decisions of the Courts on the old section of the Statute of Frauds. That was the first Act to require, that to the validity of a contract of sale of goods, there should be, in some cases, an instrument in writing. According to my view, the contract itself, as I shall show you, is not in any case required to be in writing; evidence in writing of the terms of the contract will be sufficient. I do not know why this section should, with some modifications, have been reproduced in the Sale of Goods Act. For my own part, I should have been glad to say as an English lawyer, "Farewell to the provisions of the 17th section of the Statute of Frauds." I had a great deal to do when at the Bar, in small contentious cases, in taking under the plea of "never indebted" the objection of the Statute against lawyers far too busy and quite unable to look up the law which related to their cases, and nothing was more acceptable than to be successful upon a defence of the Statute of Frauds, a defence not required to be pleaded, mark you, but which could be raised under the plea of

"never indebted," or "*non assumpsit.*" You know that now, in order to avail yourself of the Statute of Frauds, or of the 4th section of the Sale of Goods Act, you must plead and actually raise it as a defence upon the very Record that will be before the judge when the cause is tried. In the County Court it is, I believe, the practice not to take any notice of the Statute of Frauds or of the answering provisions of the Sale of Goods Act, unless the defendant, who perhaps never heard of such provisions, has given notice that he intends to rely upon its provisions as a statutory defence. How far now, seeing the Statute of Frauds is repealed, and no distinction is made in the Sale of Goods Act, between the provisions in it relating to the contract being in writing and the provisions for accepting, and paying for goods, and the many obligations which are expressed in the Sale of Goods Act, the defence that the contract is not in writing is a *statutory* defence, remains to be seen.* Nearly all the law relating to the sale of goods is now statutory. I may say in passing that in nearly all the cases where I have taken the objection of the Statute of Frauds successfully, I have had no doubt as to what the contract was.

First of all, let us deal with the section of the Statute of Frauds and we shall soon see the difference (if any) between its words and the words in the fourth section of the Sale of Goods Act. The words of the Statute of Frauds are: "No contract for the sale of any goods wares or merchandise for the price of £10 and upwards shall be allowed to be good except the buyer shall accept part of the goods so sold and actually receive the same or give something in way of earnest or in part payment or that there be some note or memorandum in writing of the bargain signed by the parties to be charged thereby or their agents thereunto

* Since I delivered this lecture, my attention has been called to the case of Brutton v. Branson, 1898, 2 Q. B., p. 219, in which it was decided that notice of a defence under the 4th section of the Sale of Goods Act must be given.

lawfully authorised." Now you must at once learn this, that the words "goods wares and merchandise" do not include stocks, shares in public companies, debts, choses in action or intangible property of any kind. I think you will find this established in the case of *Humble* v. *Mitchell*, 11 Adolphus and Ellis, p. 205. I should tell you that the Sale of Goods Act has not enlarged the scope of the 17th section, by saying that other than tangible goods should be the subject of its 4th section.

After the section of the Statute of Frauds had been in existence about 150 years, it was enacted, after many conflicting decisions, that the provisions of the 17th section of the Statute of Frauds should apply not only to bargains and sales strictly so-called (that is, sales of actual existing goods), but that the provisions of the 17th section should apply to contracts for the sale of goods which were not in existence at the time of the contract; to cases where the goods perhaps had to be manufactured or required something to be done to the goods to put them into a state in which they could be delivered in conformity with the contract. After the Statute I am about to mention, it did not matter whether the goods were in existence or not at the time of the sale—whether they had to be made or finished off and fitted for delivery to the purchaser—all such goods came within the provisions of the 17th section. The section which effected this change was section 7 of the 9 George IV. cap. 14, commonly called Lord Tenterden's Act. The Sale of Goods Act also adheres to the provisions of section 7 of the 9 George IV. cap. 14. All orders for goods, whether existing or to be manufactured, or to be altered or changed, come within the provisions of the Sale of Goods Act, 1893.

I ought also to tell you, that it was decided, after many differences among judges, that contracts entered into at auction, that is, contracts completed by the fall of the hammer of the auctioneer, were within the provisions of the Statute of Frauds. I do not

think that law has been altered, and sales by auction are within the provisions of the Sale of Goods Act, 1893. The only thing I need say to you is this, that each buying at a sale by auction is a distinct contract; so that if, at an auction, you made six purchases, each of which was less than £10 in value, each contract is good and does not come within the provisions of the 17th section of the Statute of Frauds or of the Sale of Goods Act. But do not forget, if you were to go into a shop and were to buy seven or eight different articles; although in one sense there was a distinct contract for the first and the second article, and so on, yet if by the time you have finished your purchases, the whole of the goods you have selected come to over £10, those transactions are not deemed separate and distinct purchases, but are regarded as one contract to which the provisions of the 17th section will apply. You will find this rule established in the case of *Baldey* v. *Parker*, in 2 Barnewall and Cresswell, p. 37. Bear in mind also, that if you go into a house of business and buy some things that are before you, which you can see, and which you select, and you ask the owner of the business or his servant at the same time, to make you some goods a little different from those things you see, the purchase of the existing things and the order for the things to be made will be deemed one contract, so that delivery to you of the things, or some of them, that were in existence, and which you purchased, will be deemed an acceptance and receipt of part of the goods sold, and entitle the vendor to sue you in respect of the goods ordered, although there be no memorandum in writing of the contract. This rule was laid down in *Scott* v. *The Eastern Counties Railway Company*, 12 Meeson and Welsby, p. 33. These cases will be enough for you, because they will lead you to other cases, and I shall render you no service, if I do not induce you to read the authorities, and form for yourself your own opinions.

Another thing I desire to mention. If you look in the 29th Charles II. cap. 3, section 17, you will find the words are (you listened to me, perhaps, as I read them) "for the price"—that "no contract for the sale of any goods wares or merchandise for the price of £10 or upwards shall be good." When Lord Tenterden framed his Act, the 9th George IV., he was obliged to re-state the provisions of the 29 Charles II. cap. 3, section 17, as he was getting the Legislature to enact that the provisions of the 29 Charles II. cap. 3 should apply to goods to be made or altered; for some reason or other in reciting the Act he used the word "value" instead of "price"—any goods of the value of £10. You have in the 29 Charles II. "price"; in the 9 George IV. cap. 14, section 7, you have "value." In consequence of this you must read the 17th section of 29 Ch. II., as if it contained the word value, instead of price. See what took place the other day in a small cause before me. "What is your defence here?" "If you please, it is the 4th section of the Sale of Goods Act, that no contract for the sale of goods shall be enforceable where the goods are of the value of £10 unless there be some note or memorandum in writing." I said, "Just let us see what was the contract." It was all by word of mouth, clear enough, and not disputed. The defendant agreed to buy a pony and ten weeks agistment of the pony for £11, and he said he ought not to be made to pay, because there was no note or memorandum of the contract in writing; that the pony was of the value of £10, and the agistment at 2*s.* a week for ten weeks, made the £11. The plaintiff said, "Oh, no, the pony was only worth £9, and the agistment was worth 4*s.* a week." Each party was cross-examined. The plaintiff had to admit that during the negotiations he said the pony was worth £11, and the defendant, when he was cross-examined, was forced to admit that he said it was not worth £10. There was I, with this wonderful legislation, left to determine

whether this pony was of the value of £10. I think I came to the conclusion it was not, and made the defendant pay. The solicitor for the defendant had met with the case, to which I now call your attention, of *Harman* v. *Reeve*, 18 Common Bench (Old Series), p. 587. The defendant's solicitor said, "That case is on all-fours with the present; you will not want to hear anything." I said, "Oh, I think I may." That was a case of the sale of a mare and foal and some agistment for £30: no contract in writing, and the other conditions of the statute unfulfilled: held, that on the jury being satisfied that the mare and foal were worth £10, the contract could not be enforced. In *Harman* v. *Reeve* the defendant succeeded because the goods were of the value of £10; in the case before me the defendant failed, because the goods were not of the value of £10. Just imagine at the close of the nineteenth century, a judge being obliged to fix the value of goods before he can determine whether the 4th section of the Sale of Goods Act applies! There it is. You must be on your guard. It does not follow that evidence of the contract is not required to be in writing because no price was fixed for the goods; if the goods to which the contract relates are of the value of £10 and upwards writing is required, if the other conditions of the section are not fulfilled.

There is another matter to which I must call your attention, and it is important you should remember it. If the claim of a tradesman is really for work and labour done and materials supplied, then by the law of England, the contract, under which the work has been done and the materials supplied, is not required to be in writing, and the tradesman is entitled to recover either the agreed price for the work and labour, or a fair and reasonable price, if no price were agreed upon. If, however, it should turn out that the contract is really one for the sale of goods, then, unless the vendor can satisfy some one of the conditions of the Sale

of Goods Act, section 4, he is without any remedy, if the goods are of the value of £10. In some cases the question is very simple and can be easily decided. You have some cloth that has been either sent to you as a present, or which you have bought, and you ask a tailor for how much he will make it up. He measures you, and makes the clothes out of the cloth you send him; perhaps he adds some buttons and trimmings of his own. Undoubtedly there, the transaction is one of work and labour done and materials supplied; but if, on the other hand, he is to measure you and make you a coat out of his own material, although you send him some buttons that belonged to the suit of your grandfather that you would like to have by way of ornament on the new coat, the transaction would be one of sale. It is not necessary that the work should be done upon the defendant's own materials in order to maintain an action for work and labour done. A solicitor could maintain an action for work and labour done and materials supplied although the materials on which he wrought were his own and he did not work upon the materials of the defendant. Mr. Justice Blackburn, who always hit the point, as you might expect, has given you the principle by which you can determine whether the transaction is one of work and labour done or goods sold and delivered, viz., the contract is sale, if it contemplates the ultimate delivery of a chattel. It will be found in his judgment in the case of *Lee* v. *Griffin*, 1 Best and Smith, p. 272. Before reading this case, you may read the prior case of *Clay* v. *Yates*, in 1 Hurlstone and Norman, p. 73. In the case of *Clay* v. *Yates*, Clay was a printer, and he was requested to print a manuscript, prepare it for publication, and supply paper for so many volumes. At the time he was requested to do the work, he had not seen the dedication. When the dedication was brought to him he came to the conclusion that it was defamatory, and he declined therefore to proceed with

the work or to print the dedication. The jury found that the dedication was defamatory, and the Court held that the plaintiff was right in refusing to proceed with the printing of the work. The question was whether he could sue for work and labour done, or whether he must sue for goods sold and delivered. It was easily disposed of by Mr. Baron Martin, who, in substance said, "It is clear here that Mr. Clay was not, as the result of his labour, to sell a book; the work and labour of producing the manuscript had all been done, and its value had been secured; the plaintiff was simply to buy the paper and print on it that which another mind had produced."

Now, take the case of *Lee* v. *Griffin*. A young lady had been suffering in her teeth, and had got into a very precarious state of health. She ordered some teeth to be made for her. Her mouth was fitted. Teeth were made, and the dentist was prepared to apply and secure them. He wrote a letter to tell her that the teeth were all ready. She wrote back simply to say she was very sorry, but the state of her health would not allow her to call and have the teeth fitted in, or deal with the matter just at present. She died, unfortunately, before the teeth could be placed in her mouth, and an action was brought by the dentist against her executors. The price to be paid for the teeth exceeded £10, and there being neither memorandum in writing, nor acceptance and receipt of the teeth nor part payment, the only chance for the dentist was to make out that his was a case in which he had been simply called upon to employ his skill and his ability, together with the supply of some small portion of material that was scarcely worth recognition, and that he was entitled to sue for work and labour done. The Court held that the result of the transaction was to produce a set of teeth which could be sold and delivered, and which the party ordering could buy, and that the contract, therefore, was one for the sale of goods, and was within

the 29th Charles II. cap. 3, section 17, and now, of course, within the provisions of the 4th section of the Sale of Goods Act, 1893.

I now beg to call your attention to an important difference in the language of the Statute of Frauds and the 4th section of the Sale of Goods Act. I am not called upon to decide the questions to which this difference between the Sale of Goods Act and the 29th Charles II. may give rise. It is bad enough to have the Statute of Frauds, with all its difficulties, reproduced, but when you remember that the provisions of the Statute of Frauds are purely artificial law, and do not apply to Scotland; are not found in the Roman Law, and do not exist in many civilised communities, I think the codifiers of the law might have abstained from casting doubt upon the law as it stood prior to the codification; but what has been done? The 17th section of 29th Charles II. cap. 3, was, by the decisions on it, to any man who had the sense to study them, the memory to bear them away, and the power to reflect upon them, as clear and well understood as any section in our Statute-book, and there was scarcely any difference among lawyers as to its interpretation. Now, see the words used. You must commit to memory the 29th Charles II. cap. 3, section 17. "No contract for the sale of any goods wares or merchandise for the price of £10 or upwards"—I have dealt with the difference between "value" and "price"—"shall be allowed to be good." Now, rest upon these words "shall be allowed to be good." It was decided that these words mean "shall not be a subsisting contract," or a contract to which any one could resort for any purpose. What have the codifiers done? They have said that a contract for the sale of goods of the value of £10 or upwards "shall not be enforceable by action." Why did they make that change?—unless it was, perhaps, to introduce us to that chapter of Sir Frederick Pollock's work on contracts in which he

speaks of "informal agreements"; agreements which, although no action can be brought upon them, may still subsist for all other purposes. If that is the right view of the effect of the words "no action shall be brought," then there has been an alteration of the law in the enactment of the 4th section of the Sale of Goods Act, 1893; for I have to tell you that prior to that section, if a contract was for the sale of goods of the value of £10 or upwards, unless the conditions to which I shall call your attention soon, which the Statute of Frauds requires, were fulfilled, there was no subsisting contract of any kind. Take as an authority for this proposition (and it is a very important case for you to read) the case of *Smith* v. *Hudson*, in 6 Best and Smith, p. 431. There was a man named Willden, living at Dereham, in Norfolk, who was a dealer in corn, and on November 3, 1863, he bought of the defendant, Hudson, a farmer living at Castleacre in that county, 48½ quarters of barley at 35*s.* a quarter; the sale was by sample. There was no memorandum in writing and no payment on account. The goods were to be delivered at the Swaffham Railway Station, of the Great Eastern Railway Company. On November 7 (mark the day), the defendant in his own waggons carried 48½ quarters of barley in conformity with the sample, to the Great Eastern Railway Station at Swaffham; the goods were placed in the goods shed belonging to the Railway Company; that was the place where Willden generally kept his barley, malt, and oats until he sold them, and from whence he sent out the goods in fulfilment of his own contracts. On November 9, Willden was adjudicated a bankrupt. He had not up to that time seen the barley. He had not examined the bulk to see if it was equal to the sample. He had not said he would take to the barley or intimated anything in respect of his purchase; partly, perhaps, because he knew he was insolvent and did not care to touch or

deal with the goods. On November 11 Hudson went to Swaffham and told the station-master not to part with the barley or deliver it to any one without his instructions; telling the station-master he must keep the barley, if at all, for him, or deliver it to him. On December 1 the plaintiffs in the action, Smith and another, were appointed trustees in bankruptcy of Willden, and on that day, the barley still being in the goods shed at Swaffham, they demanded it from the Great Eastern Railway Company. On an indemnity being given by the defendant, the Railway Company delivered the 48½ quarters of barley to him on December 5. The assignees of Willden, brought an action of *trover* against Hudson for the conversion of the goods. As undoubtedly Willden was insolvent when the barley left the farm at Castleacre the defendant might have abstained from delivering, but the Court held there was no valid stoppage in *transitu*, as the transit was at an end, the railway-station being the ultimate destination of the goods; the defendant had delivered the barley to Willden by delivering it to Willden's agent, and the barley was in Willden's possession at the time the defendant demanded the return of the barley. But now see, had the barley become Willden's property? That depended upon whether there was a contract binding between the parties. If there was no binding contract, what does it matter about the barley having been delivered to Willden's agent? It does not belong to Willden; it belongs to Hudson. Hudson, therefore, as owner, was entitled to demand the delivery of the barley and get it back into his possession. Why no contract? Because the value of the barley was £10 or upwards. Although there had been a delivery of the barley there was no acceptance of it on the part of Willden. He had done nothing to intimate that he took to the goods under the contract, and consequently when, on November 11, Hudson demanded back the barley there was no contract, the barley was

his own and he was entitled to have it given up to him; and the Court held that, although ordinarily the assignees might stand in the position of the bankrupt whom they represented, yet, as Mr. Hudson had demanded back the barley before ever the trustees came into existence, or had any authority to represent Mr. Willden, they could not accept the barley, and the barley must be delivered up to Mr. Hudson, who had never ceased to be its owner. Why? The Court said there was no subsisting contract of any kind; the transaction could not be allowed to be good. If I had to decide this case to-day could I, with confidence, give that opinion? The words in the fourth section of the Sale of Goods Act are not "shall not be allowed to be good," but "no action shall be brought to enforce it." Let me just look at the words that have been introduced here: "Shall not be enforceable by action." Some persons have taken the view that the words "not enforceable by action" still leave the contract subsisting, and that it may be used for any purpose except that of being the basis of an action. Consequently, if the words of the fourth section leave the contract valid, but only with this inability annexed to it, that it cannot be enforced by action, the contract between Hudson and Willden was perfectly good. The barley was in conformity with the sample, it had been delivered pursuant to a contract; true it was by word of mouth; but then the contract by word of mouth is no longer said to be invalid, but is subsisting, only an action shall not be brought upon it. The assignees of Willden were not bringing an action on the contract. They were bringing an action founded on property in the barley—property which had vested in Willden, if the words of the section 3 of 29 Charles II., had been "not enforceable by action." Such an agreement as that between Hudson and Willden entered into to-day may be deemed under the provisions of the fourth section of the Sale of Goods Act a subsisting contract, although no action could

be brought upon it; then undoubtedly a doubt, in my opinion—I will say no more—would be cast upon an opinion founded upon *Smith* v. *Hudson*.

Just one case more which may be affected by this change of language. You all know the case of *Noble* v. *Ward*, reported in Law Reports, 1 Exchequer, p. 117, and in the Exchequer Chamber in L. R. 2 Exchequer, p. 135. That is a very interesting case. I shall have to tell you directly how a contract coming within the 29th Charles II. cap. 3, section 17, or the 4th section of the Sale of Goods Act, 1893, may be altogether rescinded by parol. Take that statement at once, it may be important to you; an agreement within the 17th section of 29th Charles II. cap. 3, may be rescinded, and put an end to altogether, by parol; it cannot be modified by parol. You know this, that if there are two legal entities which are inconsistent with each other, the last which comes into existence puts an end to the first. By my will, I give my copy of "Blackburn on Contract of Sale" to A.B.; and then by a will executed subsequently, I give the same book to C.D. There are, in the second will, no words of revocation—you follow me, no words of revocation. If the second will stands, from the very necessity of the case the gift by the first will is revoked. In *Noble* v. *Ward* an action was brought on a contract for the sale of goods entered into on August 18, 1864. A contract for similar goods had been entered into on August 12. After some goods had been delivered under the contract of August 12 it was expressly agreed by parol on September 27, that the contract of August 12 should be rescinded. The contract of August 12 was put an end to. It was arranged, with respect to the goods to come under the contract of August 18, the time for delivery should be extended a fortnight. This last and new engagement was also by word of mouth. Perfectly valid for an entire rescission, not valid for a modification of the

previous contract; and therefore the person who was to supply the goods could not sue upon the last engagement because it was not in writing. But see how cleverly he was advised: "You are in time to sue upon the contract of the 18th August. You have your goods all ready to perform it. There has been no express rescission of the contract of August 18, and there has been no implied rescission of it, because the subsequent agreement of the 27th September has no existence; therefore there are no two legal entities, so to speak, one inconsistent with the other, so that the first is destroyed. The second transaction for changing the delivery is altogether without force, and is void; 'it shall not be allowed to be good.'" Mr. Baron Bramwell at the trial non-suited the plaintiff on the ground that the parol agreement of September 27 rescinded the agreement of August 18, and the agreement of September 27 was not good to sustain an action, because it was not in writing. The Court of Exchequer and the Court of Exchequer Chamber held that the plaintiff could sue upon the contract of the 18th August, although there had been an express agreement to change or modify its provisions and interfere very much with its effect. The Courts held that, because the contract of the 27th of September shall not be allowed to be good; it is not good as the basis of an action—it is not good for the purpose of rescission. If the same question arose since the fourth section of the Sale of Goods Act, by which the contract shall not be enforceable by action, but may subsist for other purposes than for being enforced by action, would the decision be the same as in *Noble* v. *Ward?* If the words "not enforceable by action" in the fourth section of the Sale of Goods Act are to have the meaning put upon those words in *Leroux* v. *Brown*, 12 C. B. 801, the decision would, perhaps, not be the same.

I am very much obliged to you for letting me speak to you to-night upon these apparently commonplace

topics; they are worthy I think of your consideration, and I shall proceed next time to discuss the bearing which the case of *Leroux* v. *Brown* (which I recommend to your consideration) has on the subject now before us, with the discussion of which I will commence my next lecture.

LECTURE IV

GENTLEMEN,—When I ceased addressing you, I was calling attention to the difference in the language of the fourth section of the Sale of Goods Act, and the provisions of the 29th Charles II. cap. 3, section 17, commonly known as the seventeenth section of the Statute of Frauds. I ventured to say that, if the substituted words in the fourth section of the Sale of Goods Act meant exactly the same as the words of the seventeenth section of the Statute of Frauds, in my opinion it was an idle and unnecessary substitution. The words of the seventeenth section, as I told you, were, "No contract shall be allowed to be good," and I told you by reference to the case of *Noble* v. *Ward*, that those words really prevented the oral agreement, unless certain conditions were fulfilled, having any legal existence; that if it was not allowed to be good it could not be allowed to be good for the purpose of an action being brought upon it; neither could it be good for an implied rescission of a previous contract. I showed you also, by reference to *Smith* v. *Hudson*, the importance of those words, "shall not be allowed to be good." Now, gentlemen, the words of the fourth section of the Sale of Goods Act are: "A contract for the sale of goods of the value of £10 or upwards shall not be enforceable by action." Those words, are taken, apparently, from the fourth section of the Statute of Frauds, and, as I hope no one here intends to see with how little learning he can discharge the

duties of his profession, but with how much, you will, of course, study every one of the provisions of the 29th Charles II., and especially the clauses of the fourth section. The fourth section of that Act provides that "no action shall be brought." I need not trouble you with the list, but, amongst others, "upon any contract or agreement which is not to be performed within the space of one year from the making thereof;" and in an unfortunate decision, I think, of *Leroux* v. *Brown*, to which I called your attention, and which I asked you to read, you will find that the Court of Common Pleas decided that no action could be brought in England upon a contract made in Calais for the employment of a man for a year from a day to come. Understand me; within that clause of the fourth section if you were to agree to employ a man for a year from the coming Monday, unless it were in writing, the agreement would be of no avail for the purpose of an action being brought upon it. In that case the Court seemed to be going right, but were at length led astray by a suggestion of counsel which the judges did not duly consider. I would not speak thus of a decision of such men as Chief Justice Jervis and Mr. Justice Talfourd, were I not following the opinion of Sir James Shaw Willes, a judge of deservedly great fame, who expressly dissents from the decision in *Leroux* v. *Brown*. As a rule the *lex loci* determines the validity of a contract, or, as it is sometimes said, *locus regit actum*, and therefore, if you were to determine the rights of the parties by reference to the law of France, the contract was perfectly binding. At Calais it is a perfectly good agreement to engage a man for a year from a day to come by word of mouth, but in England it requires an agreement in writing, and the section requiring it to be in writing uses the words, "no action shall be brought." The judges of the Common Pleas said: "What you are seeking to do in bringing this action is a part of the *lex fori*. The remedy in respect of a contract made abroad is to be

determined by the *lex fori.*" No one doubts that the particular remedy to be awarded, the limitation of the action, the rules relating to the admissibility of evidence will be determined by the *lex fori.* I never yet learned, however, that the absence of *all* remedy by action could be deemed part of the *lex fori.* The statute says that there shall be no action brought, not that you shall have an action of a particular kind or form. Here I should tell you it has been stated in the Indian Code (that part of it which relates to contract) that "no action shall be brought" means that the agreement shall have no force and effect under any circumstances. That, I think, also would be the opinion of Mr. Austin, and was the opinion of Lord Abinger and Baron Parke in a case of *Carrington* v. *Roots*, in 2 Meeson and Welsby, p. 248, to which I invite your attention. The suggestion which, as I think, led the Court astray, was that, as the words were only "no action shall be brought," the contract was not required to be in writing at the time of entering into it, but could be enforced, if a memorandum of it in writing came into existence before the action was commenced: and that consequently the words no action shall be brought did not mean that the agreement should be of no force or effect. The same rule, however, applies to contracts within the seventeenth section, where the words are that "no contract shall be allowed to be good." Under the seventeenth section there may be no contract at the time of the agreement of the parties; none even when all the goods have been delivered; but the agreement may come into existence and be good when a letter, setting forth the agreement is written and sent, stating the goods are returned, because they are not in conformity with the agreement or order. The point on which the Court relied in *Leroux* v. *Brown* is common to both sections, and is not sufficient to found the distinction between "no action shall be brought" and "no contract shall be allowed to be good." The

case of *Leroux* v. *Brown* has not been, so far as I know, reversed. It still stands as part of our law; it has led a very eminent lawyer, Sir Frederick Pollock, into saying (and perhaps he is right) that under the fourth section of the Statute of Frauds you may have informal agreements—that is, except for the purpose of bringing an action, they subsist and have the force and effect of contracts for every other purpose. Sir Frederick Pollock very properly states that under the seventeenth section —"shall not be allowed to be good"—there is no informal agreement; the agreement is void. It is much to be regretted, I think, that in codifying our law the words "a contract of the value of £10 and upwards shall not be enforceable by action" have been substituted for the words "shall not be allowed to be good." You will find in the course of your study that these words "shall not be allowed to be good" have a very important bearing frequently upon the rights of the parties.

It is with some surprise I notice that a commentator on the Sale of Goods Act who says the words of the fourth section of the Sale of Goods Act have the force of the provisions of the seventeenth section, does not refer to *Leroux* v. *Brown*, nor discuss the points to which I have called your attention.

Now, gentlemen, having shown you the difference between the Sale of Goods Act and the Statute of Frauds, having called your attention to Lord Tenterden's Act, the 9 George IV. cap. 14, sec. 7, and shown that contracts by auction are within the provisions of the Statute, I now proceed to discuss two of the simplest things, it appears to me, that could be brought under the attention of men, yet if you will study some of the early decisions on the words I am about to mention you will find them contradictory and confusing, and even in one case you will find a very great judge saying that he did not think the persons who framed the measure could have known what was meant by the

word "accept." I told you the words of the seventeenth section are in substance the same as in the Sale of Goods Act, "that no contract for the sale of goods wares and merchandise of the price of £10 and upwards shall be good unless the buyer shall accept part of the goods so sold and actually receive the same."

I now proceed to explain to you the meaning of the words "acceptance" and "receipt." Having been in business myself for seven years before I came to the study of the law, I think I never have had any difficulty whatever in determining the meaning of the words "acceptance" and "receipt;" I am bound, however, to state that many of the difficulties in the use of these terms had been cleared up at the time I came to the study of the law, and perhaps I owe more to the clear exposition of great judges than to my own experience. The words are "shall accept and actually receive part of the goods so sold." Now, gentlemen, both these things must subsist. If you have no memorandum or note in writing of the contract, no part payment, or something given by way of earnest, there must be both acceptance and receipt of the goods. Whether there is an acceptance is a question of fact to be determined by the jury, if a jury is empannelled, or decided as a fact by the judge if he is sitting alone. Excuse my saying it is not enough in certain cases to find certain facts where a judge is sitting alone; the acceptance may sometimes be, and for the most part is, an inference to be drawn from the facts; on the facts as proved before him the judge himself, like a jury, must draw the proper inference and decide whether or not there has been an acceptance; the same observations apply to receipt.

When I came to the study of the law a difference among lawyers still existed as to whether the acceptance must not be after the receipt or delivery. Gentlemen, I have pleasure in telling you that, if the acceptance exists, it does not matter whether it be before delivery, contemporaneous with delivery, or

subsequent to delivery. The only question is, Does it exist? This was decided, and all doubt at length put an end to, by the decision of *Cusack* v. *Robinson*, in 1 Best and Smith, p. 299. With reference to the meaning of "acceptance," I can only give you what has been sufficient for myself. I have always taken that word "acceptance" to mean that the vendor has in some way or other taken to the goods as those which are to come to him under the contract. In other words, there has been the mental adherence of the vendor to the *goods*. Prior to the Sale of Goods Act I do not think that "such a dealing with the goods as amounts to a recognition of the contract" constitutes an acceptance. With all deference to the learned judges in *Page* v. *Morgan*, Law Reports, 15 Q. B. 228, I do not think there is any evidence in that case of an acceptance of the goods by the vendee. See *Taylor* v. *Smith*, L. R., 2 Q. B. 1893, p. 65. Understand me, it is not necessary that the vendee should see the goods. A man can agree to take goods that he has not seen if they are in existence. I gave you an illustration in a former lecture. Hearing that a man has a horse that won the Goodwood Cup, I go to him and say, "I will give you 500 guineas for your horse that won the Goodwood Cup." He agrees to sell at that price. There may be afterwards a question of identity; but in that very act of mine I have accepted and chosen that particular horse as the subject-matter of my negotiation and contract; there is an acceptance on my part but as yet there has been no receipt or delivery. You go into a house of business, and ask the head of it, if he has a hundred pieces of ribbon like a piece you show him. "Yes," he says, "there they are," placing the hundred pieces before you and mentioning the price. You look at them. Supposing you examine two or three, and finding they are like the pattern (I am not going into the question of fraud now) you say, "I will *take* the hundred pieces at the price you name.

I will have those," in my view there is a sale of the hundred pieces of ribbon at Common Law, and there is also an acceptance of them within the statute. Other things being equal, no objection can be taken to the contract on the ground that there has been no acceptance. "How shall they go, sir?" "Send them by the London and North-Western Railway." As soon as the goods are delivered to the London and North-Western Railway there is a receipt of the goods by the vendee. In this case the receipt is subsequent to the acceptance. If I go with my cart to the house of business and I say, "I will take the goods. Put them in my cart." As soon as the goods are put into the cart there is delivery, and both acceptance and receipt exist. Here the receipt is contemporaneous almost with the acceptance. Suppose, for an example, I go into a house of business and the owner has not the goods I want but says he will procure them for me. I say, "Very well, do so. Please send them to me by the carrier." Here, gentlemen, lest I should forget it, let me warn you; keep it present to your mind, that no carrier of goods, whether by land or water, although chosen by the vendee himself, no warehouseman chosen by the vendee has any implied, mark my word, "implied" authority to accept the goods for and on behalf of the vendee so as to satisfy the statute. To take to the goods is one thing, to have the control and possession of them is another. If therefore I say, "Send them by Chaplin and Horne or by Pickford," they are delivered to me as soon as they are delivered to Pickford or to Chaplin and Horne, and in my opinion are in my actual receipt, sufficient to satisfy the Statute of Frauds or the fourth section of the Sale of Goods Act. But I have not yet accepted the goods. I have not seen them. They were not specific or ascertained at the time I gave the order. The vendor had not even the possession of them when I gave the order. On the arrival of the goods, I can take them out, if I please, for the purpose of examining

them; it is not a question under this Statute, as I see sometimes it is said, whether the vendee is bound to take the goods. It is not. The question is whether he has accepted them. They are taken out and examined; I say, "Pack them up and send them back." There has been no acceptance; there has been delivery, but no acceptance. Or, perhaps, in a moment of weakness, I think I shall sell the goods, and I say, "Put them into stock." Then they are accepted; the acceptance here is subsequent to the delivery. It does not matter: the Statute is satisfied, there are both acceptance and receipt. I should be committing a fraud, if not selling the goods as readily as I expected, I bundled them all back, and said I did not want them, and had not accepted them. If it can be proved that I marked them off with my private mark, or put them in the window or on the counters for the purpose of sale, there is an acceptance within the Statute. I have thus given you three instances of acceptance—acceptance before delivery, acceptance contemporaneous with delivery, and acceptance after delivery. Do not be lost in the study of too many authorities; take it from me that what I have said is the result of the authorities.

Gentlemen, let me, however, give you the case to which I referred. I hope you will read the case of *Cusack* v. *Robinson*. You will find there an illustration of what is meant by "acceptance," and also the principle that the acceptance may be before or after delivery. The defendant, Mr. Robinson, goes down to Liverpool and calls upon the plaintiff: "Have you any butter?" "Yes, I have a parcel lying at the dock; come and look at it." "How many?" "156 firkins." "Just open a few." The plaintiff opens six. The defendant examines them, and says he will take the entire parcel. He wrote something on a card, which the Court held was not sufficient to satisfy the provisions of the statute relating to memorandum. He, however, told the plaintiff to send the firkins to Fenning's Wharf, in London; and

they were sent there by the plaintiff. The Court held that it did not matter whether the acceptance was before or after receipt. There was an acceptance in Liverpool when he said: "I will take that parcel"; although he examined only six of the firkins. There was delivery when they were deposited at Fenning's Wharf, and received by the wharfinger for the defendant. The Court upheld a judgment for the plaintiff.

Now, gentlemen, so much for the acceptance. Now as to authorities I may give you two cases upon the question of the carrier or the warehouseman having no implied authority to accept. The first one I refer to is *Hanson* v. *Armitage* (5 Barnewall & Alderson, p. 557). This shows you what a state the Court was often in before the law was altered with respect to the parties to the action giving evidence. The man who took the order for the goods, the plaintiff himself, could not be called, and the defendant could not be called either, but the Court very properly inferred the existence of a contract from the goods having been sent to a wharf where previous goods had been sent, and directed to be delivered at Barnsley in Yorkshire, and also from an invoice having been sent to the defendant, without any direct evidence that there had been a contract of sale. Now, of course, you can call the parties and the matter is soon clearly and distinctly established. In this case the goods were sent to Staunton Wharf, in London; the goods were shipped on board a vessel, but on the voyage the vessel was lost and the goods perished. As the defendant had never seen the goods, and not selected the particular parcel sent to him, there was no acceptance on his part. The Court held that the wharfinger had no authority to accept the goods, and consequently, although there had been delivery there was no acceptance, and that the loss of the goods rested on Mr. Hanson, the plaintiff. The next case to which I call your attention is *Acebal* v. *Levy*, in 10 Bingham, p. 376, which shows that even where a man has sent his own vessel

for the purpose of receiving the goods under a contract of sale, the master who received them had no implied authority to accept the goods for the vendee. The case of *Hunt* v. *Hecht*, in 8 Exchequer, p. 814, will show you that there is no acceptance where the defendant opens the parcels for the purpose of examining them, and puts them back again, and intimates to the vendor he has refused to accept them.

Now, gentlemen, another case with respect to acceptance is where a person buying a parcel of goods by sample has a portion of the goods themselves, which he has the opportunity of seeing, delivered to him as part of the goods he is to pay for. In that case there is both acceptance and receipt. Such a case is to be found in the case of *Hinde* v. *Whitehouse*, in 7 East, p. 558. In that case a sample of sugar was given to an intending buyer. The man examined the sample and purchased 27 hogsheads at 74*s.* per cwt. The vendor delivered to the vendee the very sample he examined, as part of the goods to be received by him. Held, he had accepted and received part of the goods. He had accepted them, for at the sale by auction he bid 74*s.* per cwt. for the sugar. That is the acceptance. When the sample was put into his hands there was a delivery of part, and therefore both acceptance and receipt of part of the goods sold subsisted. If you have the samples given to you free, for your guidance, and not given you as portion of the goods you are to receive and pay for under the contract, then there is no receipt. In *Gardner* v. *Grout*, in 2 Common Bench (N.S.), p. 340, the defendant purchased 24½ tons of sacks and bags at £11 per ton. A few days after the sale he asked if he might have a sample of the goods which he was to receive. He went to the plaintiff's place of business and some of the bags were handed to him, which he took away. Held, that the sale was not a sale by sample. The goods which the defendant took away were to be charged for, as forming part of the goods he had

purchased. The Court held that there was an acceptance and receipt sufficient to satisfy the Statute.

I will call your attention to one more point, because very often it happens that a man is in possession of the goods he is about to buy. He is what you may call a bailee of the goods which the bailor, the owner, proposes to sell to the bailee. Now sometimes a difficulty arises in such a case. You see the goods are in the possession of the vendee already; he has the physical control of them. I do not mean to say the bailor may not also have a right to the possession, as he is the owner; but the vendee has the physical control of the goods. In such a case there must be a very unequivocal act on his part to make out that he has accepted the goods as vendee in order to satisfy the Statute.

The Statute of Frauds steps in everywhere, and is met with sometimes when least expected. You can read a case in which the plaintiff charges the defendant with committing an assault on him. The justification of the assault is to be determined by the Statute. Such a case you will find in *Taylor* v. *Wakefield*, reported in 6 Ellis and Blackburn, page 765. The plaintiff was tenant of the defendant. Defendant has machinery of various kinds belonging to him on the premises hired by the plaintiff. The defendant's case is, "I agreed to sell you, the plaintiff, the whole of the machinery or not at all." The plaintiff says, "Oh, you agreed, by word of mouth, to let me have a part of the machinery for £210." The plaintiff tenders to the defendant the sum of £210. The defendant refuses the offer, and thereupon the plaintiff, thinking he was entitled to the possession of a part of the machinery, began at once to seize the goods and to remove them. There is an attempt to prevent him on the part of the defendant, a squabble ensues, during which the assault took place, and an action of trespass is brought for the assault committed. Justification, "You were removing my goods." Answer, "No; they were not your goods, they were mine; and I was removing them."

The Court held there that, as the plaintiff was not to have the goods without payment, there was no acceptance of the goods. The plaintiff had done no act with the consent of the defendant; for when he proposed to take the goods the defendant said, "I shall not let you have them"; and consequently, when he did the act of removal, which, if he did it with the assent of the vendor, might constitute an acceptance and receipt, he was guilty of a tortious taking possession. The Court held in that case there was no acceptance of the goods and consequently no contract; and the plaintiff could not maintain an action in respect of the resistance offered to their removal.

I want now to call your attention to the fact that the acceptance, to satisfy the Statute, must be actual, real. I was in a case which illustrates the proposition that there must be an actual acceptance. I notice in the Sale of Goods Act that a man, in some cases, is to be made a vendee, although he has never accepted. It may be right, but under the Statute of Frauds, or the fourth section of the Sale of Goods Act, as I at present understand it, there must be an actual acceptance in order to maintain an action for the sale of goods of the value of £10; if there is no memorandum in writing of the contract, or part payment. I found in my brief that the defendant was sued for the price of goods above £10, and that he admitted he had ordered the goods by sample, and that they had been delivered to him. The brief contained the allegation that the defendant was so ill just before the arrival of the goods that he had never looked at them, nor been able to give directions concerning them; and when he was fit to attend to business, he was in such a state of alarm as to his being able to carry on his business, that he sent all the goods back to the vendor. The case was opened. Action for goods sold and delivered. Evidence given that the goods were ordered by word of mouth, and were taken to the defendant's premises, and

delivered there. Invoice also was sent. No letter or communication from the defendant until three weeks after the delivery of the goods. The judge very properly said: "Evidence to go to the jury of acceptance; from the continued possession, the jury may infer the fact of acceptance." He further said, as my defence had not been disclosed either by anything previous to the action or by my cross-examination, "What is your answer to this claim?" I said: "I am not going to dispute your lordship's proposition. I admit there are facts from which the jury may infer acceptance, but I hope to show to the jury there has been no acceptance; that the acceptance must be real. I am going to call the defendant's medical man to prove that from the very moment these goods arrived on the premises of the defendant he was in that state of health that he could not look at or examine anything, and that he was not fit to do so until three weeks after the delivery had nearly elapsed." I proved by the defendant that he never had examined or seen the goods, or done anything with them, and that on the first day he could attend to business, he sent the goods back. The judge was bound to tell, and did tell, the jury: "If you believe the story of the defendant and his witnesses, it affords a perfectly good answer to this action. The length of time the goods have been kept is some evidence for you of an acceptance, but you must find an actual acceptance, and if you think there was no actual acceptance you will find a verdict for the defendant." This they accordingly did. An illustration of acceptance being inferred from keeping the goods for some considerable time, you will find in the case of *Bushel* v. *Wheeler*, in 15 Queen's Bench, page 442. There the goods had been kept five months. I do not tell you that it is necessary that the goods should be kept five days in order to justify an inference of acceptance from lapse of time. The jury might find it from five days, according

to the nature of the goods and the business. That was a case of five months. The Court held there was evidence of an acceptance, and as there had been delivery plaintiff was entitled to maintain his action. Another case of inference of acceptance from long possession is that of *Farina* v. *Home*, 16 Meeson and Welsby, page 119. Just imagine what Mr. Farina, whose eau-de-Cologne every one has purchased who has had the privilege of seeing Cologne, must have thought of English law when his London agent told him that he had not been able to recover the value of some eau-de-Cologne which had been sold to a gentleman named Home. The order was taken in England by word of mouth, and forwarded to Mr. Farina by his agent. The goods were sent to London and lodged in a wharf, and the order for the delivery of the eau-de-Cologne was delivered to Mr. Home. Mr. Home kept the order, and when written to for payment made no reply. He did not go and examine the eau-de-Cologne, nor did he go and take possession of it at the wharf. He did not ask the wharfinger to keep it for him; nothing of the sort. The Court held that keeping the dock warrant for ten months was evidence of an acceptance of the goods, but no evidence of their receipt. Mr. Farina learned that this commercial nation had a Statute of Frauds which, although there was no dispute about the contract, prevented his recovering the price of the goods, of which the defendant had had practical control for ten months.

The vendee may examine the goods to see whether he will take them, but you may sometimes get evidence of acceptance from acts done which were more than sufficient to examine the goods to see whether they should be kept. Of such evidence you will find a good illustration in *Parker* v. *Wallis*, in 5 Ellis and Blackburn, page 21. In that case the judge at the trial nonsuited the plaintiff because, as he thought, there was no evidence of acceptance. The Queen's Bench held there was evidence to go to the jury. In that case the

defendant purchased some turnip-seed by word of mouth for above the price of £10. It was sent to him, and delivery taken. He not only examined the turnip-seed, but it being, perhaps, a little out of condition, he spread it out in some place to dry. Now, see how thoughtful the judges in banco were. The defendant had done more than examine the seed; he had put it out to dry. The judges said there were three things to which this conduct might be ascribed: first, it might be said that the seed was spread out to save it from perishing; secondly, that the vendee did it in the interest of the vendor, he, the vendee, not taking to the goods himself; and finally the vendee may have done it intending to keep the goods. The last one of those three states of fact would be sufficient to entitle the plaintiff to judgment. The jury must therefore consider the matter, and it was sent down to be tried afresh. If the jury should come to the conclusion that the spreading the seed out by the vendee was for himself, as owner, the jury might find an acceptance, and as there was delivery, the action could be maintained.

Now I have to call your attention to a very important principle in connection with acceptance; namely, that under the Statute of Frauds (and I suppose now under the fourth section of the Sale of Goods Act) there may be an acceptance which will satisfy the Statute of Frauds, which yet does not prevent the vendor from complaining of the quality of the goods which the plaintiff has supplied under the contract. Here I think many mistakes are made. Such an acceptance is not a case of conditional acceptance; it is a case of acceptance pure and simple. I see no reason why you should not say: "I will take to these goods delivered although they are not such as I ought to take, but I shall diminish the price by showing the inferior quality if I am sued for the price, or I will pay the full price and bring an action for damages

against the vendor for not delivering me the goods I was entitled to have." You know very often that in business a man has an order for goods he is sending to the colonies; he has all the goods ready to fulfil the order except a small portion coming from A. B. Everything is prepared for the completion of the order. You have got all your other goods ready, and now the parcel from A.B. arrives. The parcel is examined. The merchant says A.B. has not served me well; his goods are not up to the mark, I do not think they are as fine in quality or as well prepared, as I expected. What am I to do? I think my customer in the colonies had better have them; I will explain the matter to him in my correspondence; and the goods of A.B. are taken to and sent off. The vendee takes to the goods, and accepts them, but writes to the vendor and complains of the quality. Of course if the goods are according to order, in any action the vendee must fail, but if they are not according to order the price may be reduced in an action for the price brought by the vendor, or the vendee may pay the full price and himself bring an action for breach of contract and recover such damages as he is entitled to. That I take to be good clear sense. Thus, there may be an acceptance which satisfies the Statute by taking to the goods, although the vendee may have a right to complain of the way in which the contract has been performed. The authority for this proposition is *Morton* v. *Tibbett*, in 15 Queen's Bench, page 428. Look at the case: Mr. Morton went to March, in Cambridgeshire, and there he saw on market-day Mr. Tibbett, to whom he said, "Sir, I have fifty quarters of wheat I can sell you. Look at that sample." "How much?" "35*s.* a quarter." "I will give you 34*s.*" "Very well." The contract is for the sale of goods above £10 in value. The contract is perfectly good at Common Law. There is the subject-matter, fifty quarters of wheat, like the sample. Price fixed. "How will you take delivery, Mr. Tibbett?"

"I will send Edgley, the carrier, to receive it in one of his lighters and convey it to Wisbech." The wheat was delivered to Edgley, and when it was delivered to Edgley there was an actual receipt of it on the part of Mr. Tibbett. Now what did Mr. Tibbett do? Like a good man of business he thought he would like to sell the goods as quickly as possible, at a small profit but a sure one. Next day was Wisbech market, and, having the sample which Morton had given him, he offered the fifty quarters to a gentleman of the name of Hampson and sold them to him at a profit. Mr. Tibbett gave the sample to Hampson. Edgley brought forward the wheat to Wisbech, and by the directions of Tibbett tendered it to Hampson. Hampson examined the wheat; said it did not correspond with the sample, and refused to take it. Then Mr. Tibbett tries to do the same with Mr. Morton; but the Court of King's Bench said, "No, that is not your remedy. You cannot return these goods; they were delivered to you when they were given to Edgley. You have accepted them. You have taken to them by having sold them as your own, and realised what you thought was a profit on the transaction. You cannot be heard to say you have not accepted or taken to the goods; you have; but you may if you choose, in this very action which Mr. Morton brings, cut down the price by showing the things delivered were not according to sample, or bring your own action for damages." That decision has not been touched since. It has been observed upon, but it remains, as I think, part of our law, and unless it has been altered by the Sale of Goods Act, 1893, it is still law. You must learn and keep in your mind, that it is not necessary that the acceptance to satisfy the Statute of Frauds or the fourth section of the Sale of Goods Act should be such as to preclude you from complaining of the way in which the contract has been performed. If you have taken to the goods you must keep them, and pay for them, and take a reduction in the price if there

has been any violation of the contract. According to my view the acceptance of Tibbett was not a conditional acceptance, it was an absolute acceptance and taking to, of the goods within the Statute. In *Morton* v. *Tibbett* the Court said: "The acceptance to let in parol evidence of the contract appears to us to be a different acceptance from that which appears conclusive evidence of the contract having been fulfilled." Another case in which this rule has been followed, although I cannot say with quite the same brightness and clearness of decision, is the case of *Kibble* v. *Gough*, reported in 38 Law Times, page 204, in which so much stress is laid on the fact that the defendant had a right to reject the goods. Whether the goods were according to sample is not the point, in my opinion. If the goods are according to sample, but the vendee has not accepted them, no action will lie if acceptance is necessary to satisfy the Statute. If you cannot satisfy the condition as to acceptance and receipt you can have no action, and the question does not turn, in my opinion, upon whether the vendee has a right to reject the goods, but upon whether, unless there is some memorandum in writing or part payment or something given in earnest, he has, taking all the circumstances into consideration, taken to the goods, accepted them, dealt with them as his own. So much for acceptance. You must keep the notion of acceptance quite distinct from that of receipt. You will find in the early days that acceptance and receipt were somewhat confused, and the distinction between them not kept so clear as one would like. Gentlemen, not only has the Legislature re-enacted in substance the provisions of the Statute of Frauds but it has placed an additional difficulty in the way of determining whether a contract of sale of goods of the value of £10 is valid. By sub-section 3 of section 4 of the Sale of Goods Act, the Legislature has given an additional meaning to the word "acceptance," a meaning which,

except in *Page* v. *Morgan*, it never had before. "There is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods which recognises a pre-existing contract of sale. You may now have an acceptance of goods which is no acceptance, but only a recognition of a contract. See *Abbott* v. *Wolsey*, Law Reports 1895, 2 Q. B. D. 587.

Now I pass on to discuss the meaning of receipt, or, in other words, the delivery of the goods, and here let me say at once that unless there is some circumstance accompanying the delivery, or that the vendee has accepted the goods before they are delivered, you cannot, from the mere fact of delivery, infer acceptance. Let me beg of you to note that carefully. Of course, if the vendee, when the goods are delivered examines them, and at once, should offer them for sale to some one else, there is the fact of his offering the goods for sale, and from that fact the jury may infer that the vendee has taken to the goods; but you cannot get an acceptance from the mere fact of delivery. *Smith* v. *Hudson*, to which I referred you last week, is an authority on that proposition; that the delivery of the goods, even to the vendee himself, will not give rise to any inference of acceptance. The acceptance must be proved by other and independent facts. The facts may gather round the delivery; they may almost accompany it, but there must be something beyond the mere fact of delivery in order to supply evidence of acceptance. Of course, as I told you, the keeping of goods for an unreasonable time, for a long time, may be evidence of acceptance, but you must get something distinct from the delivery itself in order to establish acceptance.

Delivery may be made to the vendee or his agent—delivery to the carrier, chosen by the vendee or left to the vendor to choose, delivery to the vendee's own cart, and of course delivery into the vendee's own premises. Now see what this statute did in a case in which I was myself. Contract for the supply of certain merinos

from Roubaix, in France, to a merchant in the City of London. The jury found that the merinos delivered to the merchant in the City were actually according to sample, and that he ought to have accepted them. If there had been no Statute of Frauds on which to rely, as the goods were delivered and the vendee had no right to reject the goods, an action could have been maintained for goods sold and delivered. An objection was taken that there was no acceptance of the goods, and the jury found that there never had been any acceptance, because the moment the merchant examined the goods he packed them up and sent them back without a moment's delay. Here there was no acceptance, although there was delivery, nor could there, I think, be said to be any dealing with the goods which recognises a pre-existing contract of sale. The whole of the contract was in writing with the exception of the terms of credit, "One month's credit and 2½ at the end of the month." In those days, the judges did what I think is so estimable, apply the law conscientiously, and not attempt to get rid of the statute by giving a decision in which it is said justice has been done. The Court of Queen's Bench held that those terms were part of the contract, and as they were not in writing, although every other part of the contract was, there was no memorandum to satisfy the statute, and as there was no acceptance judgment must be entered for the defendant. Therefore, gentlemen, take it from me that from the mere delivery of the goods, apart from other circumstances, you must not draw the inference that the goods have been accepted.

You may also have a sale of goods that are in the possession of a bailee for the vendor. If the vendor agrees, that the goods shall be held for the vendee, and the bailee agrees to hold them for the vendee, delivery is complete. There is a receipt of the goods and so far as receipt is concerned, the statute is satisfied. Delivery in such a case is

frequently effected by an order on the bailee by the vendor. The vendor says to the vendee, "Here is an order on my warehouseman to deliver the goods to you." The order is taken to the bailee and accepted by him. The goods are held from that moment for the vendee and, undoubtedly, delivery is effected.

Sometimes you may have delivery effected by the vendor himself agreeing to hold the goods sold as bailee for the vendee. I particularly desire to call your attention to this, because, unless I am mistaken, there has been a serious alteration of the law by the Sale of Goods Act, 1893. The vendor himself may become the bailee of the vendee, and in such a case, although nothing has been touched, and nothing has occurred even, except the agreement of the parties, there will be an actual receipt by the vendee if the vendor has agreed to hold the goods for him. It is very important, of course, that this should be clearly proved; because, as sometimes there is no fact taking place, nothing occurring, on which you can put your hand and say: "There is proof of what the plaintiff asserts"—it is necessary that this case should be clearly made out. In the case of *Castle* v. *Sworder*, in 6 Hurlstone and Norman, p. 828, the Court of Exchequer Chamber held that the vendor had become a bailee of the goods for the vendee. Mr. Castle was a wine merchant at Bristol. Mr. Sworder, who was a wine merchant at Dowlais, in Glamorganshire, gave a verbal order to the plaintiff's traveller for two puncheons of rum and one puncheon of brandy. Mr. Sworder was to have a credit of six months. It was arranged that the goods should be kept in the bonded warehouse of the vendor until the vendee wanted them. The plaintiff selected particular goods answering to the order and an invoice of the same was sent to the defendant. After the appropriation of specific goods to the contract, the vendor entered the the goods in his warehouse book and they stood in the bonded warehouse as the goods of the vendee. After

such entry the vendor had no power of getting the goods out of the bonded warehouse. This case is also interesting with respect to "acceptance," for Mr. Sworder had never seen the goods; never examined them; they had always remained in the control of the vendor. Subsequent to the purchase the vendee asked the traveller if he would take the goods back or sell them for him. The traveller declined. The vendee also wrote to the plaintiff to know what sum of money he would allow for the goods. The Court held that there was evidence that the defendant had taken to the goods and regarded them as his own; that, in short, there was evidence of an acceptance of the goods by the defendant. The Court of Exchequer Chamber also held, that what took place between the defendant and plaintiff's traveller, and the entering the goods in the plaintiff's books as being sold, and also their being placed in the bonded warehouse as they were, constituted evidence of the vendor having become bailee of the vendee; and that the vendee consequently had actually received the goods; and as he had written treating them as his own, there was evidence both of an acceptance and receipt.

Now, gentlemen, I want to tell you that prior to the Sale of Goods Act, the fact of the vendor becoming bailee for the vendee destroyed at Common Law the vendor's lien for unpaid purchase money. I shall have to tell you presently that in consequence of our law transferring the property in personal chattels, by contract, without delivery, it is obliged to give a remedy to the unpaid vendor. Otherwise, the vendee could say, "I am owner of the goods purchased. I want these goods. I am entitled to possession. I want the goods at once"; but the law says, "No; the vendor shall have a lien on the goods for the unpaid purchase money, where no credit is given." In two or three cases, in which an attempt has been made to apply *Castle* v. *Sworder*, the judges have always looked

very carefully to see if the vendor had surrendered his lien on the goods. The lien of a vendor is founded on possession. He has no longer any lien where he has parted with the possession, and consequently if a vendor becomes the bailee of the vendee, whilst the purchase money is due or unpaid, the vendee is entitled to the immediate possession. I may tell you, by anticipation, that if the vendor sells the goods on credit, until the credit expires the vendee is entitled to have the possession of the goods; but if they should be allowed to remain in the vendor's possession until after the credit has expired, then the vendor is in the same position, with regard to the right of lien, as if he had not sold on credit. In *Castle* v. *Sworder* the time of payment had passed, but the Court, I think, says the lien of the vendor is incompatible with delivery of the goods to the vendee, because the lien rests upon possession, and if the vendor has become bailee for the vendee, the vendee is in possession of the goods. If the vendor is a bailee of the vendee, why then he holds the goods for the vendee, and the vendee has possession of them even as against the vendor. If so, the vendor has lost his lien, nor does the lien revive in case the vendee makes default in payment whilst the goods are in the vendor's hands as bailee. At least, that is my view, and I want you to look into the matter and correct me if you please. I am still seeking information, I hope, and light until I am finally at rest. On looking at section 41 of the Sale of Goods Act, entitled "The unpaid seller's lien," you will find the following words, which constitute, in my opinion, an alteration of the law. "The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee or custodier for the buyer." That, according to my view, is new law. It is made so, of course, by the Legislature, in whose wisdom and under whose shadow we rest. In my opinion it is absolutely inconsistent with

the law as laid down in all the cases, such as *Castle* v. *Sworder*, to which I have called attention; besides it involves the notion that the vendor is holding the goods for and on behalf of the vendee, and at the same time is holding them for and on behalf of himself.

Gentlemen, let me say to you: Never have, if possible, any doubt. The last man I respect is the man of doubts. We do not come into the world to have doubts, but to become certain. I suggest, and according to my view it was clear and settled law long before this section was enacted in 1893, that if the vendor agreed to hold the goods for and on behalf of the vendee really and truly so as to become his bailee, and thereby put the vendee in possession, the vendor's lien was gone. You will find the most learned judges saying that the two things are incompatible; and whenever they have addressed the jury on the question of whether the vendor had become the bailee for the vendee, they have always called attention to this, that before they can come to the conclusion that the vendor has become bailee for the vendee, they must be satisfied that the vendor has parted with his lien. Sometimes a vendee may say, "Will you keep these goods for me?" and the vendor says, "I will keep the goods for you; they will be all ready for you when you want them." Such language ought not to make the vendor a bailee for the vendee, because the vendor is to keep the goods ready for the performance of the contract. If such words were to pass between the vendor and a sub-vendee, they might induce the jury or a judge to find that the vendor held the goods as bailee. You must have a serious real agreement that the vendor shall part with the possession and hold the goods for the vendee. In that case you can have actual receipt by the vendee, although the physical control is in the bailor and the lien of the vendor in my opinion, except by Act of Parliament, is gone. But there, gentlemen, there are always some measures being passed which will provide business for

you and will exercise your intellect, and I think this question will be one amongst them. It seems to me that whilst the vendor has a right to hold possession of the goods for the price, there cannot be an actual receipt on behalf of the vendee; yet by the Sale of Goods Act we are to have an actual receipt on the part of the vendee, and the vendor's lien, which is founded on possession, preserved. So much for acceptance and delivery. I have tried to explain them to you as simply and clearly as I can, but in this subject, you know, if there are shallows in which a child may wade, there are depths in which an elephant may swim. There is much in the Law of Contract of Sale on which you can exercise your judgment.

I want now to call your attention very shortly to the next portion of this fourth section of the Sale of Goods Act, and the corresponding provisions of the 29 Charles II. cap. 3, sec. 17. I ought to say in passing that a memorandum of the contract in writing is not required where "something is given in way of earnest or part payment." Earnest is where you give something—a shilling for example—to bind the bargain. It will not do to strike the hand with the shilling; you must give the shilling as earnest, and such payment will bind the bargain. This giving of earnest was the good old way of binding the bargain three centuries ago. "Or part payment." I have known questions arising on this part of the section, and it is very important to see whether the alleged payment was not on account of a previous sale and not in respect of the particular transaction on which the plaintiff is suing. You must satisfy the Court that there has been a payment made by the vendee in respect of the goods the subject of the claim, in order to entitle you to give evidence of the contract by parol.

Now, gentlemen, let me pass to a very important subject, namely, the meaning of these words, "Unless there is some note or memorandum in writing made

and signed by the parties to be charged by such contract or their agents thereunto lawfully authorised." I have only two more lectures, and I have vendor's lien, stoppage in transit, and the doctrine of performance still to deal with. I will deal with them as well as I can in the two remaining lectures, but I would just like, although the time for closing has come, to state one or two more propositions to-night with regard to the memorandum, because then the whole of the time of the next two lectures will be at my disposal for the subjects I have mentioned. You will take this from me, and keep it in your mind that the 17th section of the Statute of Frauds, and the 4th section of the Sale of Goods Act, do not require the contract to be in writing. Now do not forget that. If the contract was reduced into writing and signed at the time of its formation, then the *contract* is in writing and the condition of the section is fulfilled; and as a general rule you cannot vary the written contract by any evidence of what took place, either prior to, or contemporaneous with, its being reduced into writing. If the contract was made partly by writing and partly by word of mouth, you must, to establish the contract, produce the writing. But the *contract* is, under the fourth section of the Sale of Goods Act, not required to be in writing; the parol contract will be made good by any note or memorandum of the agreement in writing made subsequently to the contract. Secondly, the requirements of the statute must all be in existence prior to the commencement of any action brought upon the contract. You will find this proposition laid down in the case of *Bill* v. *Bament*, in 9 Meeson and Welsby, p. 36. I do not stop to read it. You must have the memorandum in writing before the action is commenced; and if just before the brief were put in the hands of counsel, a letter came from the defendant, in a correspondence continued after action commenced, in which it appeared, under the hand-

writing of the defendant, that the contract was as the plaintiff declared it, it could not help the plaintiff; he must be non-suited. You must show the provisions of the statute have been complied with prior to the commencement of the action; you must therefore before the action is commenced have the agreement in writing, if that is what you are at last forced to rely upon. The next thing to observe is this, that a note or memorandum of the agreement will satisfy the provisions of this section, although the memorandum was written not for the purpose of supplying evidence of the contract, but for the purpose of repudiating the engagement. This is well settled in *Bailey* v. *Sweeting*, in 9 Common Bench, New Series, p. 843, in which case the defendant wrote to say, "I did buy certain things of you; but they have come forward in such a state that I reject them. I shall not take them." And the Court held that as it is not necessary that the note or memorandum should be written for the purpose of making a contract, if it does set forth what the parol contract was, such note or memorandum will be sufficient. Take another case, the interesting case of *Wilkinson* v. *Evans*, in Law Reports 1 Common Pleas, p. 407. Now see what the Court allows you to do in order to understand the memorandum in writing; it always allows you to show that the vendor is in trade, say, at Bristol; that the vendee is a grocer; that the things for the price of which the action is brought are things that he sells in the course of his business; that the invoice was sent to the defendant and the goods delivered. In the case of *Wilkinson* v. *Evans* you will find an order was given by word of mouth for certain cheese and candles. The defendant had received an invoice and the goods. On examination of the goods he decided to return them, and he wrote on the back of the invoice which he also returned, "The cheese were very badly crushed, so the candles and the cheese is returned.—T. Evans." The

Court held that on the evidence of the facts above stated they might fairly infer that the writing on the back of the invoice referred to the subject-matter of the invoice and the things therein charged. Evidence was given that he had given an order by word of mouth for the things, and that they were such as he was bound to receive, and although of course he said he would not pay for them, and had not accepted them, as, unfortunately, so often happens, he was obliged to pay. Now take a further point. The memorandum will be good even if it be a letter written by the vendee to a third person, and written even to the vendee's agent or a letter written by the agent who has entered into the transaction. Read *Gibson* v. *Holland*, Law Reports 1 Common Pleas, p. 1. There you will find that the agent of Mr. Holland bought a horse of Mr. Gibson, and the agent wrote the next day to his principal, who was at Exeter, telling him what he had done, and there was some correspondence from which it would appear that the defendant acknowledged and approved what the agent had done, and the Court held that the letter of the defendant, which was written to his agent, was sufficient to satisfy the provisions of the Statute of Frauds. Lastly, I may say to you that the contract may be gathered, that is, that a note or memorandum may be got from a number of letters or a course of correspondence. If, after giving evidence of identity, subject-matter, and the position of the persons, you can find evidence of the contract declared upon, contained in those papers, without the assistance of parol evidence, the statute is satisfied. If, however, you should want parol evidence to connect any portion of the correspondence then the plaintiff must fail; but if upon a fair interpretation of the whole of the letters they contain the contract on which the plaintiff is suing, then the plaintiff is entitled to succeed, although the contract is contained in several letters, and it may require some little time

and some little judgment to see if they contain the contract.

On the next two occasions I shall deal with the matters to which I have already referred, and I shall then come to the conclusion of what has been to me, hitherto, a most happy and pleasant exercise.

LECTURE V

GENTLEMEN,—When I last had the pleasure of speaking to you I was about to give you one or two illustrations of the rule that the memorandum or note of the agreement within the 17th section of the Statute of Frauds, and now within the 4th section of the Sale of Goods Act, must be such as without any parol evidence will be able to sustain the declaration or statement of claim on which any action is proceeding. I stated to you that it is open to the plaintiff to give evidence of his position, and the position of the defendant, the trade of either party, and circumstances connected with the transaction; and that when that kind of evidence has been given, if the document or documents do not then afford evidence of the contract sought to be enforced, the plaintiff must and ought to be non-suited. One illustration of this rule is found in a case which was a decision upon the 4th section of the Statute of Frauds. It is a case with which you are all doubtless familiar, but, as it is often referred to in the Courts, I may be pardoned if I again present it for your consideration. The decision is on the 4th section of the Statute of Frauds, but the principle of the decision is applicable to the 17th section of the Statute of Frauds or the 4th section of the Sale of Goods Act. The case is that of *Boydell* v. *Drummond*, in 11 East, p. 142. There the defendant was sought to be made responsible upon a contract which, by the very terms of it, could not be performed within the space of one year from the

making thereof. It was alleged that he had agreed to take the works of Shakespeare—in twenty-four monthly numbers, highly illustrated. He was to take the work in twenty-four numbers, paying for each number as it was delivered. You see neither the delivery of all the numbers nor their payment would come within one year from the making of the contract. Now Mr. Boydell, the publisher, not perhaps knowing of the provisions of the Statute of Frauds, had a book lying on his counter, on which you might have read on the outside "Subscribers to Boydell's 'Shakespeare.'" In that book the defendant wrote his name, and there can be no doubt that he intended to subscribe for the work which Mr. Boydell was bringing out. On the counter lay the prospectus containing the terms on which the book was to be issued clearly and distinctly stated. The book in which the defendant wrote his name did not contain a copy of the prospectus or refer to it in any way, nor did it state the terms on which the work was being published, nor did the prospectus refer to the book in which the defendant had written his name. Now, of course, it was open to give evidence that Mr. Boydell was a publisher, and the defendant came in to see him, and saw a specimen copy of the work, read the prospectus, and signed the Subscribers' Book, but all Mr. Boydell or his counsel could do, after everything had been attempted in the way of parol evidence, was to put in a book signed by the defendant, and a copy of the prospectus. If those two were sufficient to satisfy the Statute of Frauds the case was made out. The Court held, that as there was no reference in the prospectus to the book in which the signature was placed, and no reference in the book in which the signature was placed to the prospectus, there was no evidence whatever of any memorandum or agreement in writing to satisfy the statute. What the plaintiff desired to do was to connect the book with the prospectus by parol evidence, by giving evidence that the defendant signed the book

on the terms contained in the prospectus: this the statute prohibited. Now there is a case involving some little nicety of examination, which brings forth a very clear elucidation of the nature of the memorandum and agreement to satisfy the statute. The judgment was prepared and delivered by Mr. Justice Blackburn, afterwards Lord Blackburn. The case is that of *Peirce* v. *Corf*, in Law Reports 9 Queen's Bench Cases, p. 210. That was an action against an auctioneer for not procuring a binding engagement between the gentleman who bid at the sale for one of the numbers in the catalogue, and the plaintiff, by whom the auctioneer had been employed to sell. As it has been thought fit to put it in print, we may as well read it from the Sale of Goods Act, that when a man bids at a sale by auction, and the auctioneer on his bidding knocks it down, the sale of the article is concluded. If any of you have read Addison, you will remember his description of Tom Folio, the man who knew books by their outside rather than by their contents. Tom was always just in time to give his bid before the hammer fell, so that any one who reads the account of him knows perfectly well that the contract on a sale by auction is concluded at the fall of the hammer. However, we are solemnly told this in the Codifying Statute of 1893, from which so many important rules are absent. Now the business of the auctioneer is, if the value of the goods is of £10 or upwards, to get such an agreement as will bind the person bidding, and that, you know, is done by the auctioneer taking the catalogue on which is usually printed the conditions, reading, perhaps, the conditions of sale before he commences, and then, as soon as ever he has knocked down the hammer, being the agent of both parties, it is his duty to make the contract perfect and binding. Ordinarily the transaction is made to answer the requirements of the 17th section of the Statute of Frauds or the 4th section of the Sale of Goods Act, by the auctioneer writing the

name of the purchaser with the price on the catalogue itself which contains the conditions. Mr. Justice Blackburn expresses some doubts as to whether it can be entered into by the auctioneer in any other way, but I apprehend if he can supply evidence of the contract by anything he has written out and signed, with all due deference to the noble lord, he will have discharged his duty.

In this case of *Peirce* v. *Corf* there was the catalogue and the conditions printed on it. A grey mare was knocked down at £33; in the catalogue it was lot 49. The auctioneer had most carefully prepared what he called a "sale ledger," in which all the numbers in the catalogue were entered, and in this sale book he wrote the name of Mr. Maguire, as the purchaser, lot 49, £33. Mr. Maguire returned the mare as not answering the warranty given of soundness or quietness; and the action brought by the auctioneer against Mr. Maguire failed because it was found there was no binding contract. Thereupon, an action for negligence was brought against the auctioneer by Mr. Peirce who had employed him, and the Court of Queen's Bench held that the action could be maintained for this very reason, that there was no signature of the vendee, by the auctioneer, as his agent, on the catalogue and conditions. There was a signature in the sales book—what the auctioneer called the sales ledger; but the conditions were not annexed to or copied in the sales ledger, nor did the book in which the name of Mr. Maguire was entered contain a reference to the catalogue and conditions. The Court held that no evidence could be adduced to show that Mr. Maguire had purchased the mare for £33, and that it was knocked down to him and a binding signature given by the auctioneer; because there was no connection by reference or otherwise between the two documents, and parol evidence to connect them was inadmissible. Now see again how carefully you have to look at things and with what carefulness our great

Judges examine the facts of the cases brought before them. Mr. Maguire wrote a letter—"Dear Sir, I return to you the grey mare, lot 49, which I purchased of you to-day at your sale, because it does not conform to the warranty that was given." Now see what Mr. Justice Blackburn said: "This is very nearly satisfying the statute, not by what the auctioneer did, but by something in writing, subsequently signed by the purchaser." If there was a binding contract, however established, the auctioneer could not be made responsible for any loss which followed, because although he had not made the contract as he ought to have done there was still a binding contract between Mr. Peirce and Mr. Maguire. This case will give you an illustration of my meaning as to the admissibility of oral evidence for the purpose of appreciating the letter. The Court would have held that evidence would be admissible to show a sale by auction and that there was a catalogue, because lot 49, as every one knows, refers to a lot at a sale by auction. The Court was of opinion that the letter meant a sale, by auction, and of something, mentioned in the catalogue; in the catalogue there were the conditions; therefore we will add to this letter "Dear Sir, I return you the grey mare which I purchased of you to-day, lot 49," these words "in your catalogue, and on the conditions contained therein." The Court did not confound oral evidence for the purpose of establishing the contract, and oral evidence for the purpose of applying its provisions. I should like to ask every one of you to tell me what then is the objection to the letter of Mr. Maguire as a compliance with the 17th section of the Statute of Frauds or the 4th section of the Sale of Goods Act. It is this. The letter does not mention the price; nor did the catalogue to which the letter referred contain the price. The letter written does not say, "I bought of you for £33 lot 49 in your catalogue." If it had, the letter would have satisfied the statute and the

contract would have been binding. The price, as there was one, was part of the contract. The letter omitted the price and the book signed by the auctioneer omitted the conditions. The Court held that neither what the auctioneer had done nor what passed between the vendor and vendee in the course of correspondence satisfied the provisions of the statute. So much therefore, gentlemen, for this point, that if the memorandum in writing consists of two or more papers or documents and parol evidence is needed for the purpose of connecting them together, there is no memorandum in writing. If the circumstances are such that the Court itself can see that the documents are sufficiently connected to make out the contract declared upon in the action, the provision of the statute as to a memorandum in writing are fulfilled.

Now I must tell you that the names of the parties to the contract must appear in the memorandum or agreement. The memorandum need not contain the signatures of both parties to the contract, but must contain their names, and if the name of the vendor is not there, although the name and signature of the vendee are, the memorandum will be insufficient. It will be sufficient if, although the name of the vendor is not expressly stated, it may be fairly inferred from the expressions used. If I may say so, with all respect to the Court of Exchequer, I think the plaintiff strangely failed in a case of *Vandenbergh* v. *Spooner*, reported in Law Reports 1 Exchequer, page 316. Poor Mr. Vandenbergh! He had signed a memorandum, at the instance of the defendant, which did not set forth truly the terms of the contract. The jury found that the memorandum did not contain the contract between himself and the defendant; then Mr. Vandenbergh put forward a memorandum signed by the defendant containing the terms of the contract as the jury found them. The Court held he had not a sufficient memorandum, because the memorandum did not contain the plaintiff's name

as vendor. This is the delightful state of things under the Statute of Frauds. What, gentlemen, are the words? "D. Spooner agrees to buy the whole of the lots of marble purchased by Vandenbergh and lying at the Lyme Cobb." I am afraid you do not know what the Lyme Cobb means; this is not an age for history. Lyme Cobb, I may say in passing, is where Monmouth landed in 1685. If that memorandum does not satisfy the statute, with all respect to the Court of Exchequer, what does? I am pleased to say Mr. Justice Willes did not approve of the decision. You must look at everything very carefully. The Court of Exchequer relied on a case like this: Suppose the memorandum was for a horse bred by A.B., would that prove a contract with A.B.? No. But when the memorandum says Spooner is buying the slabs of marble bought by Mr. Vandenbergh, it makes Mr. Vandenbergh, on Spooner's own statement, the owner of the slabs, and by proper inference, the person, who is selling them to Spooner. The presumption of law is that if a man is once the owner of goods he continues to be owner until something appears to displace that presumption. Therefore I infer from Mr. Vandenbergh being stated to be the owner of the lots of marble that Mr. Vandenbergh is clearly disclosed on this document as the principal and the person selling. The Court of Exchequer held that the memorandum did not satisfy the section of the Statute of Frauds, and now, the section of the Sale of Goods Act, and the plaintiff was non-suited. Gentlemen, you must look at these cases and study them for yourselves.

The next thing is to observe, that although the names of the parties to the contract must appear, it is not necessary to have the signature, except of the person that is being charged in the action. You will see that the gentleman who codified the law, and produced this Act of 1893, has made an alteration to which I call attention, and it brings you to the very point I am on.

I told you, and your memory ought to tell you, that the words of the 17th section were: "Except some note or memorandum of the bargain be made and signed by the *parties* to be charged"; and according to my view, and if I had to decide the case, I should come to the conclusion that it was intended that the memorandum, to satisfy this statute, should be a document prepared for the purpose of creating and making a binding agreement, and that it was to be signed by both parties, the *parties* to be charged by its terms. There is scarcely a contract, if you take the implied conditions, in which both parties do not come under obligations, and I think the words "the parties to be charged by the contract" meant the persons who were entering into the contract or engagement, and who were coming under responsibility, and not merely the party who by chance might be sued. Gentlemen, the Courts in their wisdom have decided that the words "the parties to be charged" do not mean both parties, but only the party who in the course of events may become a defendant in a suit at law. That is it, and therefore under these decisions you may have a man with a piece of paper in his possession which binds A.B. to take, it may be, 100 tuns of oil, whilst he himself is perfectly free to disregard, if he chooses, his verbal promise to deliver the oil. Suppose a parol contract to sell 100 tuns of oil. The vendor says to the vendee, "Just put our agreement in writing, if you please." The vendee writes thus: "I, William Willson, have purchased 100 tuns of oil, at £30 a tun, from James Johnson, deliverable," &c. Now, you see the only signature to that piece of paper is the signature of the vendee. There is no signature of the vendor, and the vendor can, if he pleases, disregard the parol engagement into which he has entered; if it suits his purpose he can say: "I tender you the 100 tuns of oil at £30 a tun, and ask you, the vendee, to fulfil your engagement. So that now you have a transaction by which one man is loose and the other is bound,

and it appears to me strange that such a condition of things should be allowed to exist. It only, I think, often provokes injustice rather than prevents it to have a state of the law in which one man is bound and the other not. You need, however, only have the signature of the party to be charged, and that was finally decided, in the case of *Laythorp* v. *Bryant*, 2 Bingham's New Cases, page 735, to mean the party who is being sued. Do not confound "signature of the party to be charged" with the names of the parties. The document that is signed must be a note or memorandum within the statute, but it will be good if it is signed by the party to be charged. Hence, now you see in this 4th section of the Sale of Goods Act the words are not "the parties to be charged," but "the party to be charged," which means the party who may by chance have an action brought against him. You must take it that this is the law of England, and it can and would be applied to-morrow morning.

Now, the next thing I want to tell you, and that very quickly, is this: that you may have yourself to conduct an inquiry, whether the note or memorandum which is put forward contains the true contract between the parties; by which I mean the parol engagement into which they have entered. Now you know very often after persons have made a parol engagement they get into correspondence; and a man may write: "Thomas Johnson—Dear sir, when are you going to send me the 50 quarters of barley that I bought of you on such-and-such a day on such-and-such terms?—Robert Smithson." Very well. This letter may be put forward as a note or memorandum of the contract. There is the name of the vendor, and the signature of the party to be charged, the vendee, and the document contains the subject-matter of the contract and perhaps the conditions. What is the defence? This was not the contract. This paper does not contain the parol contract; it is not a note or memorandum of the contract. The contract was for a fixed price,

30*s.* per quarter, which is not in the agreement or memorandum. If you take the memorandum as the contract, the obligation will be to pay for the barley a fair and reasonable price, having regard to all the circumstances of the case; because where no price is fixed there is still a contract, as I have told you, but a contract to pay a reasonable price for the goods having regard to all the circumstances of the case. If a jury or a judge found that the reasonable price for the barley was 30*s.* a quarter, the memorandum is not worth anything for the purpose of sustaining the plaintiff's case, because it is not a memorandum of the agreement; it does not contain the price. I have actually known a vendor so unconscientious as to endeavour to charge the head of a department in a city house with the price of goods when the city house could not pay, by saying: Here is the contract. "Mr. Thomas Roberts—Dear sir, when will you let me have the goods I ordered?" setting forth the goods and the price. The Court of Exchequer scouted the notion that such a letter could be a memorandum, when there never had been a contract with the defendant, because the vendor knew perfectly well that he was the head of the department, acting for another, in giving the order. So take it from me, that no mere note or memorandum is conclusive of the matter, and that you may still have to contend with the defendant, who alleges that the memorandum does not contain all the terms of the contract, or that the contract, of which there is a memorandum under his signature, was not made with him. This view of the law is sustained by the case of (always keep it in your mind) *Acebal* v. *Levy*, in 10 Bingham, p. 376. There you will find that bags of nuts were sold at a fixed price by word of mouth. Letter from the defendant referring to the purchase omitting the price. The jury found there was a fixed price for the nuts, and that was the only thing the defendant could be called upon to pay. Held, that the letter did not constitute a memorandum within the meaning of the section, and as the contract

was therefore by word of mouth, no action could be maintained in respect of it. Read carefully the case of *Acebal* v. *Levy*.

I must ask you to consider a remarkable decision on the 4th and 17th sections of the Statute of Frauds, and now binding on the interpretation of the 4th section of the Sale of Goods Act: viz., that a proposal in writing, which is the commencement of a negotiation, verbally accepted, will constitute a memorandum of the agreement; that is, that a letter written before the existence of the contract is a memorandum of it. The provisions of the section are to be satisfied by a proposal in writing made before ever the agreement was concluded. That is the law, and you must remember it. You will find it authoritatively stated in the case of *Reuss* v. *Picksley*, in 1 L.R. Exchequer, p. 342, following a case of *Warner* v. *Willington*, 3 Drew. p. 523, decided by a very eminent judge, Vice-Chancellor Kindersley. There the Court of Exchequer Chamber decided that a proposal in writing accepted verbally may constitute a note or memorandum of the contract within the 17th section of the Statute of Frauds.

Let me tell you, printing of the name will be quite sufficient if it is put forward as a signing of or signature to the agreement. Suppose, therefore, you buy some things in a shop and the owner or his agent takes down an invoice, puts in your name, puts in the things that are bought, price and conditions, and then hands it out to you, *Schneider* v. *Norris*, in 2 Maule and Selwyn, p. 286, shows that such document will be a perfectly good memorandum to bind the vendor. You see he hands it out with his name printed on it; the document in no way binds the vendee. He has written nothing on the paper; it is merely an invoice he has taken and carried away with him. You will also find that it does not matter if there are only initials as I told you, and even if the initials are in pencil; the initials will constitute a signing. Forty years ago some

doubt existed as to these propositions, and a gentleman who went to the Bench left a doubtful opinion behind him as to whether initials and in pencil would be sufficient to satisfy the Statute of Frauds. The Statute of Frauds has rested on the minds and hearts of lawyers for two centuries, and it is only when they get above it, that they can see it in a clear and bright light.

The next thing to tell you is that the memorandum may be created by telegraphic communication. Read *Godwin* v. *Francis*, L. R. 5 Common Pleas, p. 295, and see how the proposition is made out. You have seen already from what I have said that it is not necessary that the memorandum should be subscribed. The Statute does not say " shall be subscribed by the party " ; therefore if the signature of the person to be charged is found in any part of the memorandum, beginning, middle or end, it will satisfy the statute if it was placed there with a view to what Lord Westbury called " governing the whole of the instrument." That is seen clearly in a very important case of *Johnson* v. *Dodgson*, in 2 Meeson and Welsby, p. 653. There Mr. Dodgson, who was a sharp Yorkshire tradesman, did not think that he was going to put his own signature to a memorandum when he desired to get the signature of a gentleman to a memorandum of a contract by which he had sold him twenty-seven pockets of Playsted hops at 103*s*., and four pockets of Selme hops at 95*s*. I always think Mr. Dodgson was not justly treated. He bought the hops by sample as he thought very cheap, at a very low price. I am afraid he did not get what he bought. He thought: Well, this is such a good parcel, I will have the signature of Mr. Johnson's traveller to a memorandum of the contract, and so he writes down in his own book, in his own handwriting, " Sold John Dodgson twenty-seven pockets Playsted hops at 103*s*., four pockets Selme hops at 95*s*., samples and invoice to be sent by the

Rockingham Coach," and then he said to the traveller "Now please put your name to this." The traveller read the memorandum and put "Johnson, Johnson & Co. *per* D. Morse." When the samples arrived Mr. Dodgson was of opinion that they were not equal to the samples by which he purchased, and he refused to receive and pay for the goods. He defended the action on the ground that the samples he saw at Leeds were not the same samples as those that were sent by the Rockingham Coach. The jury found there was no substitution of samples. Poor Mr. Dodgson was in great distress at this finding, and his counsel told him he was in a difficulty. What happened next? You will hear. "But," they said, "my lord, the goods are above the value of £10; no instrument in writing." "Oh yes," said the judge, "a perfectly good instrument in writing; this memorandum was drawn for the purpose of being a memorandum of the contract; perhaps the defendant did not think he was going to be bound, but he wrote his own name, wrote 'sold John Dodgson,' that writing of his is a signature and binds him." The Court of Exchequer said, "That the ruling of the learned judge was correct." It is painful to think of the feelings of Mr. Dodgson who felt he had been defrauded, and could have escaped even from the snares of the vendor, but for his eagerness to procure the signature of the traveller. This is a very important case to remember, because you will see how it bore on a case to which I will soon call your attention.

It does not matter where you find the name, if it is a signature and intended to govern or authenticate the transaction which the man is drawing up. Now there is another case to which I desire to call your attention. Never trouble yourself with remembering all the cases you read, and if they are in harmony with your view of the law at the time you read them, you can always dismiss them, because when they come up for discussion

you can distinguish or explain them, in a moment, as you did when you read them. If, however, you have got a case which differs from your own view, keep it before you by powerful memory or memorandum. If you get one or two cases, it will be quite sufficient, but read as many as you can. In connection with what I have just said, read *Caton* v. *Caton*, in Law Reports 2 House of Lords, p. 127. That case is very interesting. Two elderly people were about to marry, and they had the misfortune to be wealthy. Therefore they entered into a long negotiation as to how the property of each should be settled on the marriage. Many sheets of correspondence, a parol agreement, and at length a draft was prepared by Mr. Caton to carry out the agreement. In this draft, the name of Mr. Caton written by himself appeared four times. A draft settlement was prepared, but was not executed, Mr. Caton promising to leave certain money by will to the intended wife. At length there was a desire to enforce the agreement for settlement, because Mr. Caton died, and did not, by his will, fulfil the promise he had made. The House of Lords held that the contract was one which was required to be in writing by the 4th section of the Statute of Frauds, because it was an agreement made in consideration of marriage. They also held there was no memorandum of the agreement because there was no signature; that T. C. was put to parts of the agreement, and was only intended to authenticate or govern a portion of the agreement, and that there was no signature to the document in any part of it. I tell you, if you do not find the man's signature at the bottom of the instrument, where you would perhaps look for it, it may be left to the jury whether he refused to subscribe the document because he disapproved it, and it will be for the jury to say whether he had really ever signed the instrument as a binding transaction, although his name, written by himself, appears in the body of

the instrument. If you get the signature, it must be so placed as to show it was intended to relate to or govern every part of the agreement. That is *Caton* v. *Caton*.

Now, gentlemen, the next thing to which I wish to call your attention is, that the agreement may be signed by an agent. It is not necessary that the agent to sign the agreement should be authorised in writing. He may be authorised by word of mouth or by conduct. You will see a clear illustration of this in the case of *Durrell* v. *Evans*, 31 Law Journal, Exchequer, p. 337. Durrell, grower of hops; Evans, hop buyer. Noakes, a factor in the Borough, makes more or less a contract between Durrell and Evans for thirty-three pockets of hops at sixteen guineas per hundredweight. Noakes was not a broker. If a broker is an agent, he forms the contract by making both a bought note and a sold note. You will find this stated in the case to which I refer you. Noakes was not a broker, but the question was whether there was evidence of Noakes having authority to draw up a memorandum of the bargain. The evidence of Noakes was thus: "I said to Evans, 'Will that do; shall I draw up the agreement?' 'Yes,' said the defendant. 'I drew it up; showed it to him.' 'Oh,' he said, 'you have got it dated October 19; then I shall have to pay on Saturday week. I want another week. Alter it to the 20th, then I shall not have to pay till Saturday fortnight.'" The memorandum was altered by Noakes accordingly, and the document was taken away by Evans. Another portion of it was kept by Noakes. Now what was there on the paper which Evans took away? "Messrs. Evans bought of J. and T. Noakes—J. T. Durrell underneath—33 pockets of prime hops," and the conditions of the agreement. The Court of Exchequer decided that the memorandum drawn up by Noakes did not satisfy the Statute of Frauds. In this case you can see how eminent judges may be misled by a phrase. They have much work to

do, must do it quickly, and sometimes they are precipitate. The Court of Exchequer said: "This memorandum will not satisfy the statute: the document which Mr. Evans took away is only an invoice, and, as for the alteration at Evans' instance, it is only as if the vendee asked the vendor to correct his own invoice. Where is the signature of Evans?" The Court decided the memorandum was not sufficient to satisfy the statute. Four great judges concurred in this decision; but they were reversed in the Exchequer Chamber, and in what way you will see at once. Mr. Justice Willes, being there, called attention to the case of *Johnson* v. *Dodgson*, in which you will remember "Sold John Dodgson," written by himself, was decided to be a perfectly good signature. Then said the learned judge: "If the memorandum written by Noakes had all been written by the defendant, the memorandum would have been sufficient. You cannot, after *Johnson* v. *Dodgson*, say it would not; the document drawn up by Noakes is in no respect an invoice; it is a memorandum. There is the note, 'Sold Messrs. Evans.' Supposing the defendant wrote it, then *Johnson* v. *Dodgson* shows that it is good." "But," said Mr. Justice Willes, "the memorandum will be good if signed by an agent thereunto lawfully authorised." The only question now remaining is, whether there is any evidence of Noakes being the agent of the defendant in drawing up the memorandum. The learned judge said, "I not only think there is evidence of Noakes being the agent to draw up the memorandum, but a verdict on that point in favour of the defendant would be a verdict against the weight of evidence." In these views all the judges in the Exchequer Chamber agreed, and, as the plaintiff was nonsuited at the trial on the condition that if there was any evidence to go to the jury, he should have a verdict entered for him, the judgment of the Court of Exchequer was reversed, and verdict and

judgment entered for the plaintiff. With what simplicity and skill the Court of Exchequer was overruled.

So much for the case of *Durrell* v. *Evans*, and so much for what I have to say to you on the provisions of the 17th section of the Statute of Frauds and the 4th section of the Sale of Goods Act, 1893. It has taken me some time to explain and illustrate these provisions, but they are not to be mastered without considerable study, and all the decisions on them will not be retained without a great effort of memory.

Now I want to read you these few words: "I shall rejoice," said Lord Chief Justice Campbell, a man of enormous experience at the Bar, and a great and learned lawyer, "when this statute goes. It does more harm than good; it promotes fraud rather than prevents it, and introduces distinctions which are not productive of justice." In every sentence of the learned judge, if I may be permitted to say so, I acquiesce, and I regret that any man or set of men in attempting to prepare a code of commercial law for the great and honourable people of this land should have re-enacted principles so distasteful to justice, and so hurtful to the whole community as this section. Gentlemen, you never reform anything in England unless you have a sort of volcanic action.

Now, gentlemen, I think you must give me a few minutes more to-night, because I want to clear away some unimportant clauses of the Sale of Goods Act, and the next evening will be my last. I want to call your attention to some few sections of the Sale of Goods Act, because I am following more or less the provisions of that Act, as I am bound to do, in my discussion of the Law of Contract of Sale. I call your attention to section 6 of the Sale of Goods Act. In the margin you read "Goods which have perished." It does not say when. That section says that where goods have perished at the time of the contract without

the knowledge of the vendor and the vendee there shall be no contract. You may read this proposition in Domat or Pothier without any trouble, and you will find that some of our judges have placed the principle of this section under the head of contracts entered into in mistake. Supposing I say, "I will agree to buy your estate and as the price thereof grant you an annuity on the life of A.B." A.B., without the knowledge of the contracting parties, was dead at the time of the negotiations. In such case there would be no binding engagement. In the case of goods that have already perished at the time of the sale, it has been held that there was no valid contract. This was decided by the Court of Exchequer in *Couturier* v. *Hastie*, 9 Exchequer, page 102, and in 5 House of Lords Cases, page 673. In this case one man agreed to buy and another to sell a cargo of corn which the vendor believed at the time of the sale to be on board a certain vessel. Twenty days before the contract was entered into the vessel had been wrecked, the cargo had been damaged and sold by the master of the vessel. The Court held in that case there was no contract: the property had perished at the time of the contract being entered into.

Now the 7th section requires a little more illustration, and I want to give you just a few observations upon it. Where there is an agreement to sell specific goods, and subsequently to the contract, the goods without any fault on the part of the seller or buyer, perish before the risk passes to the buyer, the agreement is thereby avoided. That section, gentlemen, seems to me to rest upon this principle, that where there is a contract for specific goods, or goods that are to arise from a particular source, and the property in the goods has not passed to the vendee, then the promise to deliver is discharged, if the promise cannot be fulfilled by causes over which the vendor has no control. Now I do not like, as I told you, to multiply conditions and implied promises in the contract of sale. I do not want to bring

into the contract a promise to deliver the goods to the vendee if they are in existence, or if the things come forward, but simply to say that if the specific goods cannot be delivered by reason of causes over which the vendor has no control, then he is excused. You can apply this rule not only to contracts of sale, but to other contracts—contract of bailment, as in the case of goods lent or let on hire. If the goods lent or let on hire perish, whilst in the possession of the borrower or hirer without any fault on the part of the borrower or hirer, he is discharged from the obligation to return the thing borrowed or hired. If a person agrees to let something on hire, and before the time of putting the hirer in possession or enjoyment of the thing to be let, the thing to be let on hire is destroyed, the person letting on hire is discharged from his obligation. Clause 7 is only one instance of the application of a general principle. The principle and an important application of it can be best seen in the case of *Taylor* v. *Caldwell*, in 3 Best and Smith, p. 826, a great decision of Lord Blackburn. In that case some gentlemen desired to have the advantage of holding certain concerts in the Surrey Music Hall in the year 1861, if the defendants who were in possession of the music hall would allow the concerts to take place. The defendants agreed that the plaintiffs should have the use of the hall on certain nights. Certain artistes were engaged. The plaintiffs were to have the benefit of the tickets sold, but the plaintiffs were to give the defendants £100 for each of the nights on which the concert should be held. Before the day came for the first concert, the Surrey Music Hall was burnt to the ground. The defendants had it no longer in their power to allow the plaintiffs to have the use of the hall for the concerts. An action was brought against the defendants for not allowing the plaintiffs to have the use of the Surrey Music Hall on the days mentioned. The Court held that this was a contract

for the supply of a specific thing—not the supply of *a* room, but the particular room known as the Surrey Music Hall. The Court held that where the contract is for the hire of a specific place, although in terms it may be absolute, the person who promises is freed from the performance if he cannot fulfil the engagement by causes over which he has no control. Do not be deceived by cases, which say, that if a man promises to load a cargo on board a vessel he must load a cargo whether he is able to procure the cargo or not. He has promised he will load a cargo. There is no act of God which has prevented his performance of his promise. He is not able to fulfil his engagement simply because he could not procure the cargo as he expected. Take another case. A. has agreed to supply B. with 200 tons of potatoes of a particular kind; he can supply them by procuring them where he pleases; it does not matter to B. where A. gets the potatoes if they are such as B. is entitled or bound to receive. Let us look at another case showing that the vendor is relieved by the destruction of the things which he is to deliver. There is no difficulty about the law. There is difficulty in its application. In dealing with such cases as are now under our consideration proceed slowly, take one step at a time. First get the terms of the contract and study them well. Shut off from your mind everything else. Do not think of the performance of the contract or any of the conditions which either party may have to fulfil until you have got the contract. Get all the terms, and when once you have studied the contract and put the right construction on it you will not be far out in dealing with the obligation of the parties. Too often people rush on and read quickly and do not notice every particular word. Look then and study the contract. What does your contract say? If it says that the vendee is to have a cargo it does not take you long to see that he is not called upon to take two-thirds of a cargo, unless

there is an express provision, that he is under certain circumstances to take less. Again, what is the contract? A November shipment of rice. Very well. If that is the true construction, there is no difficulty in seeing whether it has been performed. What was forwarded? Why, a December shipment. This shipment the vendee will not be obliged to take unless the vendee waives the objection or something else arises to entitle the vendor to enforce the obligation to take the goods. Get the contract, and when you have it there will be very little difficulty in seeing, in my opinion, what the obligations of the parties are. An illustration of this rule is seen in the short but pregnant judgment of Lord Justice James, in the case to which I am about to call your attention. The case is *Howell* v. *Coupland*, reported in the Law Reports 9 Q.B. p. 462, and in the Court of Appeal, 1 Q.B. Div., pp. 258. Mr. Coupland was a grower of potatoes on his own land. He agreed with Mr. Howell to sell him 200 tons of regent potatoes, on a riddle of $1\frac{5}{8}$. Look, however, at these words in the agreement. "Grown on land belonging to Coupland in Whaplode." On these few words the question in the cause turned. "Grown on land at Whaplode" was not, as was contended by Mr. Howell, a contract to supply 200 tons of regent potatoes, with a promise that they should come in the first instance from his land. The Court held the contract to be a contract for a portion of the crops that would come into existence on the defendant's land. There will be specific goods on a day to come, and it is a portion of those specific goods that the defendant has agreed to supply. The plaintiff could not be made to take regents generally. Has not he asked for regents grown from the land of the defendant? It is very important to get a promise from a man to sell you his own potatoes because of the quality of the land, and the fine quality of the potatoes he produces. The Court held in the case of *Howell* v. *Coupland* that

the contract was not a contract for any 200 tons of regent potatoes, but for 200 tons of regent potatoes to come from the defendant's land. The season was bad; only 80 tons could be got off the defendant's land. He had more than enough land under cultivation to give perhaps double the 200 tons; but disease destroyed the crop, and he had only 80 tons to deliver. The Court held he was excused from delivering more because he was prevented, in a contract for a specific thing, or that which would become specific, from fulfilling the engagement into which he had entered by circumstances over which he had no control. Said Lord Justice James: "What is the contract? Is it a contract for a certain quantity of potatoes of a particular sort, with a warranty that they shall be supplied; or is it a contract to deliver 200 tons of potatoes out of a specific crop? I am of opinion it is the latter: if so the defendant is excused by reason of his being prevented by causes for which he is not answerable." Those are the cases with respect to the perishing or failure of the goods subsequent to the contract, and before the property has passed to the vendee. Where the property has passed, other considerations arise. As I have told you, when the property has passed, the risk is the risk of the owner, and the plaintiff is entitled to his money if the thing he sold has perished without any fault on his part.

Let me call your attention to two or three more sections of the Sale of Goods Act that are worthy of your attention. The provisions to which I desire to call your attention relate to the determination of the price by arbitration. It is enacted by the 9th section of the Sale of Goods Act that if the price is to be fixed by the valuation of a third party, and such third party cannot, or does not, make such valuation, the agreement is avoided. The section, however, goes on to say—what I think any one of you would readily state—that if in the meantime the vendee, or the proposed

vendee, has taken any of the goods and appropriated them, he must pay for them a reasonable price. Then it proceeds further to enact that if such third party has been prevented from making the valuation by the conduct either of the vendor or of the vendee, the party not in fault may maintain an action for damages against the party in fault.

Another important question in connection with the sale of goods is whether the time stipulated for is of the essence of the contract. Now, you may take it that the time for payment as a rule is not of the essence of the contract. It is provided in the 10th section of the Sale of Goods Act that unless a different intention appears, stipulations as to time of payment are not to be deemed of the essence of a contract of sale. The authority for this proposition is an old case, *Martindale* v. *Smith*, 1 Q.B. p. 389. In that case the plaintiff had purchased six stacks of oats of the defendant. He was to pay for them at a particular time, the subject-matter of the sale being specific goods, and the contract attaching upon them. The property had passed to the vendee, and the plaintiff was entitled to maintain an action founded on his right of possession unless there was something which separated the right to possession from the ownership. The vendor had a lien on the goods for the unpaid purchase-money. The purchase-money was not paid at the day named in the contract—nay, the vendee was even two or three months in arrear in the matter of payment. The vendor had kept the goods; he had not sold them; they were still in the possession of the vendor, the property being in the vendee. The plaintiff (the vendee) comes in August and tenders the whole of the purchase-money to the vendor, who refuses to take the money or give up the goods. The Court held that by the tender of the money the lien had become extinct, and the property in the goods being in the plaintiff he was entitled to their possession, and was able to maintain an action

of *trover* against the vendor. You see, it was held in this case, that time was not of the essence of the contract. But with respect to almost all other stipulations in the contract, whether time is of the essence of the contract will depend on the terms of the contract. Thus, time for the delivery of the goods will be, in the absence of anything to the contrary, deemed of the essence of the contract. This you will find laid down in the important case of *Reuter* v. *Sala*, L.R. 4 Common Pleas Division, page 239. Lord Justice Cotton distinctly lays it down that the rules in equity relating to the sale of land, where time is seldom regarded of the essence of the contract, are not applicable to commercial transactions.

Then you must not forget that there may be a refusal to pay which constitutes such a breach of the contract as entitles the vendor to say, "I shall deliver no more goods under the contract." This question arises where goods are to be delivered by instalments. A refusal to pay for one instalment does not, as a rule, relieve the vendor from the delivering the subsequent instalments. The refusal may be in such form, however, as to relieve the vendor from making subsequent deliveries. You will find an illustration of this, in the case of *Withers* v. *Reynolds*, 2 Barnewall and Alderson, page 882. There the defendant had agreed to supply from October in one year to June in the next, three loads of wheat straw every fortnight on the terms that the plaintiff should pay 33*s.* per load for each load of straw delivered. At the end of January the plaintiff owed for several loads of straw, and he thereupon paid for all the straw delivered except the last load and said he should always keep one load in hand. The defendant said he would send no more straw unless it was paid for on delivery: and no more was sent. When the vendor declined to deliver any more straw upon the conditions mentioned by the vendee, the vendee brought an action for non-delivery; the Court held that the question between the parties

was not a question of time being of the essence of the contract, but was a case in which the refusal to abide by the terms of the contract, was a repudiation of the engagement into which the vendee had entered—a complete repudiation of the contract, and that the vendor was thereby relieved from the obligation to supply more straw. Then read with *Withers* v. *Reynolds* the case in the House of Lords of *Mersey Steel and Iron Co.* v. *Naylor*, reported in 9 Appeal Cases, page 434, in which you will find the discussion of the rule that what a man has failed to do on one side must go to the very root and essence of the contract to make it a ground for rescinding the contract. In that case there was to be delivery of goods by a series of deliveries, payment to be made within three days after receipt of shipping documents. On the first delivery the defendant, the vendee, made default in payment. As a petition was presented to wind up the company, he thought he ought not to pay and would not pay until after the petition had been heard. The defendant was quite willing to take the subsequent deliveries—the company said they should treat the refusal to pay as releasing the company from all obligation to make subsequent deliveries. The Court held that the mere failure of the defendant to make payment for the goods in conformity with the contract did not release the company from the obligation to make further deliveries. These two or three cases will put you in possession of the law relating to the question of time being of the essence of the contract, in respect of payment.

The next point to which I must call your attention is whether on a contract of sale of goods there is an implied promise on the part of the vendor that he has a good title to the goods sold. Whether such an implied promise exists has been until the Sale of Goods Act the subject of discussion for many years. The 12th section of the Sale of Goods Act has made some explicit pro-

visions under this head. It has declared that in every contract for the sale of goods there is an implied condition—I should like to say there is an implied promise —that the vendor has a right to sell the goods. The contract is also to imply a warranty that the buyer shall have and enjoy quiet possession of the goods.

Now, gentlemen, you will have to read two or three cases on this point in order to appreciate the law as stated in the 12th section, because the section goes on to say, unless the circumstances are such as to rebut this presumption and make you come to the conclusion that there was no implied warranty of title. I hope the additional words will lead to a number of disputed cases to give you employment in the years to come. It used to be said, and it was thought, when I came to the study of the law in the year 1858, that on the sale of a specific or ascertained chattel there was no implied warranty of title, and that the rule *caveat emptor* applied. As an authority for that proposition lawyers cited the case of *Morley* v. *Attenborough*, which is reported in 3 Exchequer Reports, p. 500. It has always been decided and is still law, that under an executory contract of sale where the vendor is to procure the goods, either manufacture them or buy them, there is always an implied condition or warranty of title. This has, I think, always been the case. The next exception to the rule that on the sale of a personal chattel, there is no implied warranty of title was this, that if a man made any affirmation as to the goods being his, or so conducted himself as to make the vendee believe that he did warrant the title, then there was evidence from which the jury might find a warranty of title. Thus, if the vendor said, "Will you buy this nice jacket? It is one I purchased the other day. It is one of the best I have." These words would be evidence from which a jury might infer the affirmation that the thing belonged to the vendor, and that there was a warranty of title. Lord Campbell said in his day that the judges had eaten the

life out of the rule by the number of the exceptions they had allowed. A large portion of the rule also was taken away when, in *Eichholtz* v. *Bannister,* in 17 Common Bench (N. S.), p. 708, the Court decided that a sale of goods by a shopkeeper involved a warranty of title. That was the next large slice out of the doctrine of "no implied warranty." *Morley* v. *Attenborough* itself may be still good law. Attenborough, the pawnbroker, simply sold a number of unredeemed pledges. He was not selling what was his own. He had nothing but the interest arising from the pledging of the goods. Where they came from, what places they had been in before they had been pawned, how many times they had been pawned, no one could tell. The Court held that there was no implied promise that Attenborough had any title to the goods, and that the only statement for which he could be made liable was that the goods had been pledged to him and the time allowed for redemption had passed. Unfortunately, stolen goods are pledged, and Mr. Morley acquired no title to an article he bought. The Court held he could not bring an action for breach of contract, because he had obtained what he had bargained for, namely, such rights as Mr. Attenborough possessed. Let me stop here; even those two or three carefully studied, and the statements I have made, will lead you, I trust, to a true apprehension of the law as it now stands—namely, that on the sale of a personal chattel there is an implied warranty of title, unless the circumstances are such as to lead to a contrary conclusion. May you ever be wise in determining when such circumstances exist!

LECTURE VI

Gentlemen,—I think it will be scarcely possible for you to understand the clauses in the Sale of Goods Act, 1893, relating to conditions, unless I call your attention to some related subjects. Unless these are discussed in conjunction with conditions, I think the provisions of the Act of Parliament will not be fairly or properly understood. With the study of conditions, I combine the study of three other things. The four things to which I wish, therefore, to call your attention, are representation, warranty, condition, fraud; and those four things are so closely connected that I think they should not and ought not to be studied apart. Now during negotiations for a contract of sale, either prior to the negotiations or during the negotiations, some statements of fact relating to or affecting the subject-matter of the sale are frequently made, and chiefly, by the vendor. An important question, when such statements are made, arises whether these statements form part of the contract, or not; whether the party making them has promised they are true; or whether they are in fact only representations, and not forming any part of the contract into which the parties have entered. It does not matter whether the statement of fact be made orally by word of mouth, or whether it be contained in an instrument in writing which constitutes the contract between the parties; if the statement is only a representation, it does not form any integral part of the contract. Whether the state-

ment is a representation, if the contract is made by word of mouth, it will be for the jury to find; whether the representation amounts to a warranty or condition it will also be their duty to determine; but it will be for the judge, of course, to say whether or not the facts are such as justify the jury in finding the statement was a warranty or a condition. If the contract has been reduced into writing it will be for the Court to say whether the statement contained therein is a representation or a warranty. In order that a warranty may exist, it is not necessary, that the word "warranty" should be used—it is sufficient if the representation forms part of the contract; such representation may not only be a warranty; it may be a condition also. Now, gentlemen, it is unfortunate that the words "warranty" and "condition" are sometimes used interchangeably, and you will find in a decision of Mr. Baron Parke, in *Ollive* v. *Booker*, in 1 Exchequer Reports, page 423, the following words: "It appears to me that it is a warranty, and not a representation, that the vessel had sailed three weeks. It is therefore a condition precedent." You must bear in mind that "warranty" is an assurance or a promise that something exists, generally, in a matter collateral to the principal object of the contract; but it is a promise that something exists, not necessarily that anything will be done by the vendor. Then a condition is some fact or event upon which may depend the very existence of the contract of sale. Sometimes the condition is merely a provision that in a certain event the contract shall be void or only valid, upon the happening of a certain event. Sometimes neither the condition itself nor the contract contains any promise that the event shall happen or that something exists. The non-fulfilment of the condition in such a case will annul the contract, without imposing any obligation on the party on whose behalf the condition was imposed. Sometimes the condition itself may contain an agreement or promise that the event exists or shall happen. In this

latter case, if the event does not happen, the contract may sometimes be annulled; sometimes the contract may be regarded as subsisting, and an action of damages brought for the breach of the agreement contained in the condition. You now have these three words, "representation," "warranty" which sometimes is declared to be a condition, and "condition," with its twofold meaning, one imposing and one not imposing an obligation. Now, gentlemen, the case which I have always kept in my mind, and have used on three or four occasions, as showing the distinction between representation and warranty, is the case of *Hopkins* v. *Tanqueray*, to be found in 15 Common Bench Reports, at page 130. In that case a horse was to be sold by auction; a day or two prior to the sale, a person named Hopkins, thinking he would like to buy the horse at the auction, went to the stables of the defendant, and there proceeded to make an examination of the horse. Whilst he was making it, the owner, the defendant, Mr. Tanqueray, came into the stables and said, "Oh, you need not trouble yourself to examine the horse's legs; you may rely on me that the horse is sound in every respect; you have nothing to look for." Mr. Hopkins relying upon the statement of Mr. Tanqueray, desisted from further examination, and the next day bought the horse at auction for a certain sum of money. The horse turned out to be unsound. In the contract at the auction, nothing was said as to the horse being sound and there was at the auction no warranty of its soundness. Mr. Hopkins brought an action to recover damages, and an effort was made on the part of Mr. Hopkins to procure him compensation, by first of all relying upon the representation as having been made fraudulently. The jury found the representation of soundness was made, that the horse was unsound, but negatived the suggestion that the representation was made fraudulently. In the claim founded on the representation the plaintiff was unsuccessful. The

counsel next endeavoured to establish on Mr. Hopkins' behalf that there was a warranty that the horse was sound; but the Court held that what had passed in the stable was only a representation; that what passed on the previous day was not even during a negotiation for sale or concurrent with it. It is not necessary, of course, that the statement, in order to be a warranty, should be uttered immediately before the contract is concluded; it may be a warranty if it takes place whilst the negotiations are pending or being conducted. The Court held in this case that the representation did not form part of the contract, and there was no evidence proper to be left to the jury in support of the allegation of warranty. On the second ground the plaintiff failed. He failed altogether, although he had in buying relied upon a statement which was untrue, and which caused him a considerable loss. Keep, therefore, in your mind the distinction between representation and warranty. If the statement is representation, not warranty, you can only secure compensation by establishing that the representation was made fraudulently. There has now been introduced to all the Courts, the equitable doctrine, by which a claim to the performance of a contract, where the contract has been induced by the statement of material facts which turn out to be untrue, may be resisted, and the contract rescinded, although the untrue statements were not made fraudulently (see *Redgrave* v. *Hurd*, 51 L. J. C. D. p. 116). But if one of the parties to the contract desires to recover damages founded on a representation, he must show that the representation was fraudulent. I need scarcely say more to you on the question of fraud, in passing, than that to be fraudulent, the statement must be made dishonestly, the party making it knowing it to be untrue or making it recklessly, not caring whether the statement is true or false. It will not be sufficient to show that the defendant did not exercise reasonable care in ascertaining whether

the statement he was making was true or false. Just take another case in which the distinction between representation and warranty may be seen, the case of *Russell* v. *Nicolopulo*, in 8 Common Bench Reports, New Series, at page 362. In this case there was a contract for the sale of a cargo lying in Queenstown; the contract was in writing. There was the following statement in it: "This cargo is accepted upon the report and samples of Messrs. Scott and Co." It turned out that the cargo was not equal to the samples delivered. It was contended on the part of the defendant that the statement was only a representation that the samples had been taken and the report made, by Messrs. Scott and Co. Undoubtedly the samples had been taken by Scott and Co. and the report made by them. If the construction put upon the contract by the defendant was correct. the plaintiff must fail. The Court held that the statement was not a representation merely: that it was part of the contract, and was, in other words, a warranty; that the contract contained a promise that the cargo itself was equal to the samples delivered to the plaintiff. The cargo was not equal to the samples which were delivered to the plaintiff, and the Court held he was entitled to recover damages for the breach of warranty. Now, in the previous case of *Hopkins* v. *Tanqueray*, you had representation, made by word of mouth. In this case you have the representation in writing. The Court determined the statement of fact contained in the written instrument was not a representation, but a warranty.

Now, gentlemen, I must call your attention to one or two cases of conditional contracts, in order to show you there may be conditions which do not involve any agreement and some which do. The 11th section of the Sale of Goods Act reads thus: "Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition or may elect to treat the breach of such condition as a breach of

warranty, and not as a ground for treating the contract as repudiated." There you read of conditions to be fulfilled by the seller, or, in other words, of conditions that involve agreement. To be free from all danger in applying this section, you ought to be told of conditions that involve no agreement on the part of the seller and some illustrations of such conditions given to you. Take the case of a sale of goods to arrive: such a sale is conditional; subject to the vessel arriving and with the goods on board, the goods which the vendor has agreed to sell. Such a contract does not contain any promise on the part of the vendor that the vessel will arrive, or that, if it arrive, it will have the goods on board. If the vessel does not arrive with the goods, then there is no contract between the parties, see *Boyd* v. *Siffkin*, 2 Campbell, 326; *Johnson* v. *MacDonald*, 9 Meeson and Welsby, p. 600; *Hale* v. *Rawson* 4 C.B. N.S. p. 85. Take another case: you may have an absolute agreement to sell. I sell you five tons of nitrate of soda at a certain price; this is absolute. If, however, in the contract there is this proviso, that if a vessel named the *Mary Jane*, out from such and such a place, does not arrive in London by a particular time, the contract is to be void: then, if the vessel does not arrive at the time named, there is no longer any contract between the parties. There you have a condition, the non-fulfilment of which will annul the contract which has been already entered into. You have in these two illustrations, a condition upon the existence of which the contract is to become effective; and the other a condition, by which a right already existing is to be destroyed, in case the condition is not fulfilled. Take another case, a very important one, which gave rise to considerable discussion, the case of *Bannerman* v. *White*, in 10 Common Bench, New Series, page 844. Now you know, it is often stated that, if the property under a contract of sale has passed, and there is only a warranty, the vendee cannot reject the goods; he must take the goods and use the breach of warranty either

in reduction or extinction of the price, if an action should be brought for the price, or he may, if he chooses, pay the price and bring an action for damages for breach of warranty. If, however, that which is called a "warranty" amounts to a condition, then the vendee is entitled not only to take the goods if he chooses and bring an action for breach of warranty, but he may reject the goods entirely, saying the contract is at an end by the condition not being fulfilled. In *Bannerman* v. *White*, the defendant purchased a very large quantity of hops, of the value, I think, of £16,000; this was at a time (there is always something happening in respect of beer) at which the great brewers of Burton complained that some sulphur had got into the beer through the hops being treated with sulphur. Circulars were sent round in all parts of Kent complaining of the hops being treated with sulphur, and stating that the merchants of London would not buy hops in respect of which sulphur had been used in their growth. In this case a question arose whether what passed at the formation of the contract was warranty or condition. The defendant stated that in the course of his interview with the plaintiff he said: "I will not consider the matter if sulphur has been used in the growth of these hops;" the plaintiff's evidence was that, when asked if any sulphur had been used, he said: "There was no mould this year and therefore no occasion to use any sulphur." Two witnesses said that the plaintiff was told that the hops would not be bought if sulphur had been used, and that he said no sulphur had been used. Chief Justice Erle left to the jury the question, whether the contract was subject to the "affirmation" that in the growth of the hops no sulphur had been used. The jury found that the purchase was subject to such affirmation, and that sulphur had been used in the growth of the hops. Thereupon, the Court decided that, although the defendant had in one sense taken to the goods—they had been actually delivered, examined

and weighed—yet, as the sale was subject to a condition, the affirmation being held by the Court to amount to a condition, it was not too late for the vendee to exercise his right under the condition and to declare the contract to be at an end. The plaintiff could not recover the price of the hops and was obliged to take them all away. It was a very hard case, for all the hops were grown without sulphur being used, except with regard to the hops from five acres, a very small portion of the bargain: but as the hops from these five acres were mixed up with the other hops, the Court held the defendant was entitled to reject the whole. That is a case of a condition putting an end to a contract which already existed. It may be in this case, as there was a written guarantee given against any loss which might arise through the mode of treatment of the hops, the defendant, if he had taken the goods and dealt with them in such a way as not to be able to return them, might have sued for breach of contract and recovered damages.

I will give you now another case of what is called a condition involving an agreement upon which an action could be brought. Take the case of *Gorrissen* v. *Perrin* in 2 Common Bench (N.S.), p. 681. In that case you will find that there was a contract for 1170 bales of gambia—these are the words, "Now on passage from Singapore contained in two vessels," mentioning them. When they arrived, the 1170 bales were found not to be bales according to the custom in the trade; they were too small, and the defendant was entitled to reject them. The Court held that the words "Now on passage from Singapore" might have been treated as a condition and the contract cancelled; the words might be treated also as a promise that the goods were actually on their way from Singapore at the time of the contract, and an action for damages brought, because 1170 bales, such as the vendee was entitled to receive, were not on passage from Singapore. The Court held that the words were not merely a condition, but

that they amounted to a promise, for breach of which an action could be brought. The plaintiff sustained an action by alleging a promise on the part of the vendor that goods, namely, 1170 bales, were on board at Singapore, whereas there was not 1170 bales in the true sense of the word, but a much smaller quantity; the words were therefore taken as a warranty on the part of the vendor that that quantity of goods was on the way. The plaintiff maintained his action. There was a second count which you may, perhaps, look at; it will interest you to read it; it was founded on the fact that 1170 bales had arrived, but the Court rejected that claim. The plaintiff put his claim in the second count on this ground, that there was on board these vessels when they arrived more than enough to give the plaintiff his 1170 bales. A portion of the goods which arrived were consigned to and belonged to some one else, and the Court said they could not put the construction on the contract that the vendor was to sell and dispose of goods that were not his own, therefore the plaintiff failed on the second count and succeeded on the first, namely, that the contract contained a promise or assurance that 1170 bales of gambia were in two vessels then on their way from Singapore, and as that was not correct, he was entitled to maintain an action for non-delivery of the 1170 bales.

Now, gentlemen, although the next case does not bear directly upon the contract of sale, the statements in it are so important, and the law is stated therein with such remarkable accuracy, that I must call your attention to it: its language will serve for a guide in the application of the eleventh section of the Sale of Goods Act, which we are now considering. It is the case of *Behn* v. *Burness* in 3 Best and Smith, p. 751. In that case a charter-party had been entered into, and there was a statement in it that the vessel was *now in the Port of Amsterdam*. You know the importance in entering into a charter-party, of knowing where the vessel is;

the chance of the vessel reaching its destination, of its being able to do the work which the charterers desire to have done; everything may depend upon that fact. The vessel was not in Amsterdam at the time of the charter-party. The Court of Queen's Bench held that the words "now in the Port of Amsterdam" were not a condition; but the Court of Exchequer Chamber reversed the decision of the Queen's Bench, saying that the words did constitute a condition. You have in that case the affirmation, "Now in the Port of Amsterdam." The Exchequer Chamber held that it was not merely a representation, not merely a warranty in the narrow sense of the word, but that it was actually a condition which entitled the defendant to throw up the whole charter and to let the vessel stay upon the hands of the plaintiff, for such use as he could make of it. The Court laid down this proposition which is also discussed in this eleventh section of the Sale of Goods Act, namely, that a condition such as I have mentioned may be a contract, and consequently that the condition may be waived and an action brought upon the agreement. Although the statement was "Now in the Port of Amsterdam," the charterers might say, as the vessel has come forward we will employ her and if by the untruth of that statement, we sustain any damage, we will sue the owner upon the promise that she was at Amsterdam at the time of the charter-party. The Court held he might, if he chose, rely on the words "Now in the Port of Amsterdam" as a condition and put an end to the whole engagement between himself and the owner of the vessel. Gentlemen, keep these things in your mind. If a statement or affirmation is a representation merely, you must show that it is fraudulent if you wish to recover damages. If the statement is false but not fraudulent, perhaps such false statement may be used by way of defence to an action. It is not in either case part of the contract. If the representation is part of the contract, then, of course there is a promise;

it may be, also, if it is part of the contract, a condition; you may either use the statement as a condition to put an end to the contract or an agreement, the breach of which will give rise to a claim of damages.

The next matter to which I call your attention is the clause in the Sale of Goods Act relating to sale of goods by description. What a number of cases there have been in the books about this one subject! It is one of the most difficult questions of fact perhaps to try, whether that which the vendor has supplied the vendee with, is the thing contracted for. I have heard such a question tried out for days at the Guildhall; but that anybody should doubt as a matter of law that a person is entitled to have that which he bargained for surprises me. In the thirteenth section, the right of the vendee to have the goods bargained for is put as an implied condition. It is, in my view, a clear case of direct understanding and agreement. It is not possible to consider an agreement in writing or listen to an account by word of mouth without seeing there is an express or implied promise. As Lord Ellenborough said in one case, "You have got the actual undertaking that the man is to have sassafras wood." So, gentlemen, the case you will read for your own advantage is a case of *Chanter* v. *Hopkins* in 4 Meeson and Welsby, p. 399, because it contains a very simple, and some would think a rather low, style of illustration in determining a legal question; but Lord Abinger simply said: "If a man offers to buy peas of another and he sends him beans, he does not perform his contract: but that is not a warranty: there is no warranty he should sell him peas; the contract is to sell peas, and if he sends him anything else in their stead, it is a non-performance of it." That is all. The case relating to sassafras wood is reported in 3 Campbell, 642. There two tons of fair merchantable sassafras wood were contracted for, and it was found by the jury that the wood delivered did not come under the description, in the course of busi-

ness, of sassafras wood. The plaintiff was non-suited. Another good case to look at, is the case of *Nichol* v. *Godts*, 10 Exchequer Reports, p. 191. That is the case of a man bargaining for some foreign refined rape-oil, warranted only equal to sample, and the Court held there that, although the thing tendered was equal to sample, yet as it was not (the jury found it not to be) "foreign refined rape-oil" in the ordinary commercial use of those words, the plaintiff could not recover damages for the refusal to take delivery. The plaintiff had not offered to deliver what he promised. Do not put anything as a condition, if you can help it, which can be got out of the terms the parties have used. It burdens the memory, to have conditions.

Now, gentlemen, it is important to bear these things sometimes in mind, because I was present in an Inferior Court, when I was in practice. The decisions were given there with the utmost rapidity. The defendant said: "I bought white grapes; the cases were not opened at the sale; look at his catalogue; when the cases came, they contained black grapes." "Oh, but," said the judge, "with all faults. Judgment for the plaintiff." "What, with all faults, I am to take black grapes?" exclaimed the astonished defendant. In my opinion a very wrong decision. The man did not want black grapes, and never purchased them. All faults meant with all faults, being white grapes. It will be your pleasure, gentlemen, sometimes to correct judges.

The next thing is to consider when, and under what circumstances, there may be an implied warranty or condition as to the quality, or fitness for any particular purpose, of goods supplied under a contract of sale. If you are buying a particular article and you have a fair opportunity of examining it, there is no implied promise that it is fit for any particular purpose and no guarantee or promise of quality or fitness. But if you make known to the seller the particular purpose for which you want the goods, and it is not a

specific article placed before you, but something he, the tradesman or merchant, is going to manufacture or provide for you, then there is a promise on the part of the vendor, or the person taking the order, that the thing shall be reasonably fit for the use to which it is to be applied. See section 14 of the Sale of Goods Act. You will find a very good illustration of this principle in the case of *Randall* v. *Newson*, 2 Q.B.D. p. 102. Mr. Randall ordered a pole for his carriage from a coachbuilder. Having a latent defect, the pole broke, and caused some damage to the horses. The Court held there that, as he ordered a pole for a carriage, and the defendant knew the purpose for which he was going to use it, there was a promise on the part of the manufacturers that the pole should be reasonably fit. The jury found that the pole was not reasonably fit. If you take the earlier case of *Jones* v. *Bright*, 5 Bingham, p. 533, you will find this doctrine clearly laid down. In that case a man wanted some copper sheeting for the purpose of lining his ship. Who can doubt, that if I went to a man and said, "I want copper sheeting for the lining of my ship," that I desired it should be such as is fit to cover my vessel and prepare it for its voyage? The Court held there that there was a promise that the thing was to be reasonably fit for the purpose to which it was to be applied.

I want to call your attention for a moment to the fact that this is only an illustration of a very wide principle. The reasonable fitness of an article supplied is not confined to the contract of sale. The same principle applies to articles supplied under contracts of hire or to things let out for use. A person hired a carriage and pair of horses of a livery stable-keeper in Brighton for an afternoon's excursion; the pole broke whilst the carriage was being used by the hirer, in consequence of a defective nut. The hirer sustained considerable injury, and brought an action to recover compensation. At the

trial the learned judge told the jury that the livery stable-keeper was only bound to take reasonable care to see that the carriage was fit. This obligation is far short of the obligation of promising that the carriage *is* reasonably fit. It might be that the livery stable-keeper had taken reasonable care, and yet that the carriage was not reasonably fit. The jury found a verdict for the defendant; the Court, however, directed a new trial on the ground that the real question to be put to the jury is, whether the carriage which the livery stable-keeper supplied was as reasonably fit for the journey on which it was to be used, as care and skill could make it. *Hyman* v. *Nye*, L.R. 6 Q.B. Div. p. 685.

Now take a case the name of which, I think, is *Francis* v. *Cockrell*, L.R. 5 Q.B. p. 184, on appeal, p. 501. In this case it was held that if a man puts up a stand for persons to sit on, either to view a race or a cricket-match and takes a half-crown for a seat, he is not to be liable only in the event of his not having exercised reasonable care in the construction of the stand, but he impliedly promises that the stand is reasonably fit for the purpose of receiving the person who paid. You must not regard the obligation of the person who is to supply something, as being the same kind of obligation as that which rests upon the bailee of a thing for safe custody. Look at the case of *Searle* v. *Laverock*, Law Reports, 9 Q.B. p. 122. In that case an action was brought against a livery stable-keeper for not keeping a carriage, safe from harm, which had been delivered to him. He showed that he had taken reasonable care to have the shed in which he placed the carriage properly constructed, and the room in which the carriage was placed was, as far as care permitted, a fit and proper room. The yard was all right, properly locked up and cared for. A storm of wind came (perhaps not enough to make it the act of God) and the shed came down and damaged the carriage. The question was, What was the obligation resting upon the bailee? Mr. Justice

Blackburn delivered one of his most important and instructive judgments, showing that the obligation of the bailee is only to take reasonable care; he does not promise that his place is reasonably fit to receive the carriage, and he distinguished it, therefore, from the case of *Jones* v. *Bright*, and would have distinguished it from the case of *Randall* v. *Newson* if it had then been decided, and also from the case of *Francis* v. *Cockrell*, where the money was taken for a grand stand which had been erected. It is also important for you to bear in mind that the obligation of a railway company with respect to the carriages in which they place their passengers is only to exercise reasonable care to see that the carriages are fit. As the railway company does not let out the carriage to hire, but only agrees to carry the passenger or passengers on a particular journey, the obligation of the railway company is not like that of the livery stable-keeper who, when he sends out a carriage, promises that it is reasonably fit for the journey. A railway company does not promise to provide any particular carriage for the passenger, but only promises to carry him on a particular journey, placing him in any carriage they like. If a carriage is defective, the railway company will only be responsible in case the jury shall find, that by the exercise of reasonable care, the accident could have been guarded against (*Redhead* v. *The Midland Railway Co.*, Law Reports 2 Q.B. 412). I give you these cases because this question of "reasonably fit," under the first sub-section of the 14th section of the Sale of Goods Act, touches other relations than that of vendor and vendee, and also involves discussion of obligations that are nearly allied.

Now the next thing to remember is that, if goods are bought by description from a seller who deals in goods of that description, there is an implied condition that the goods shall be of merchantable quality. The vendee is not bound to take goods that are not saleable in the market, and my impression is, even if there is a

sample, still it is involved that the goods shall be merchantable. If the buyer has examined the goods, there will be no implied condition as regards defects which such examination ought to have revealed (see sub-section 2 of section 14). Some of the remaining provisions of the Sale of Goods Act we can pass over quickly. We are told that a contract of sale is a contract for sale by sample where there is a term in the contract to that effect. Such a contract arises usually when goods are offered for sale which are not before the buyer for inspection, and a small portion of the bulk is tendered to the buyer to show the quality of the bulk. If the sample is produced only for the purpose of allowing the intended buyer to form his own judgment, there would be no sale by sample. If the contract is not in writing, the contract must be found by the jury, and if a sample were produced at the time of the sale, the jury doubtless would, in the absence of cogent evidence to the contrary, find the sale to be by sample. On a sale by sample, the sub-section 2 of section 15 of the Sale of Goods Act says there is an implied condition that the bulk shall correspond with the sample in quality. I do not like the implied condition. It would be very difficult to listen to a contract of sale where a sample has been produced and a sale made amounting to a sale by sample, without getting an express or implied promise that the bulk shall correspond with the sample. I prefer the express or implied promise if I can get it, because I am sure to find it in the contract itself. An implied condition I may forget. If you look into "Bullen and Leake on Pleading" you do not find an action brought for the breach of a condition, but of the promise that the goods should be reasonably fit or merchantable, or that they should be equal to sample. Then follows this allegation, "and all conditions have been fulfilled, and all times elapsed necessary to entitle the plaintiff to have delivery of such and such a thing." Whenever I can I

get a promise; then I am on a sure ground. If you will permit me, I say to you, do the same, no matter what the change in language may be in the Sale of Goods Act. It does not necessarily follow that the contract has been by sample because a sample has been shown at the time of the sale. Look at the case of *Gardiner* v. *Gray* in 4 Campbell, p. 144, in which it was held that the sample was only produced to show the kind of goods the vendor was offering for sale.

Then we are told by sub-section (*b*) that on a sale by sample the vendee is to have reasonable opportunity of comparing the bulk with the sample. This statement is clear and its provision just. It calls for no comment.

Now, gentlemen, let me next call your attention to two or three matters which are found in the Sale of Goods Act. I do not know under what head quite to class them. They may be placed under the head of Miscellaneous Provisions. I am obliged, to some extent, to take this Act as my guide, and offer comment on most of its sections. You must study this Act, because it is binding on any tribunal to whose notice its provisions are brought. You know, as a rule, that a man cannot give a better title than he himself has. It is a very common proposition, and patent to the student, the moment he enters on his studies; but there are one or two cases in which this rule does not apply. One of these cases, is the case of a purchase of goods in market overt in good faith and without notice of any defect of title on the part of the seller. You will have to look carefully to the meaning of "market overt." As a rule it means the open market. In the country, of course, it means the place where the market is usually held, and held with the ordinary conditions. Long usage leaves no doubt of the place. It must be held on the days fixed by charter or prescription. In the City of London every shop is market overt, for the things the shopkeeper professes to deal in, and that on every day, except

Sunday. Thus the vendee will get a perfectly good title, if he buys, from a shop in the City of London, the things in which the vendor usually deals. But if you buy silk handkerchiefs of a man who deals ordinarily in gold chains and lockets, as a jeweller, you must be indeed on your guard. It is doubtful, whether the shop is market overt for the things which a shopkeeper buys, the things which a man brings to him and offers for sale. That has not been decided yet, I think, Remember, that in order to a sale in market overt, the things must all be in the market. It has been held that a sale in the City of London, the goods being elsewhere, outside the city, as in a warehouse at the Docks, does not constitute a sale in market overt. In the country you just ascertain the nature and limits of the market, and prove that the things were there, and sold openly before all people. If that is the case, then the vendee acquires a perfectly good title, even although the vendor may himself have stolen the things he has sold or obtained them by fraud. Then, gentlemen, you will have to learn that the property in goods stolen may re-vest in the true owner on conviction. If you look at the 22nd section as to market overt, and then at section 24, you will find that where goods have been stolen, and the offender is prosecuted to conviction, the property in the goods so stolen re-vests in the person who was owner of the goods stolen, notwithstanding any intermediate dealing with them ; so that, if they have been dealt with half a dozen times, passed from hand to hand six times, the original owner or his representative, on conviction, may claim the property in the things stolen. But be on your guard. It is only as against the person, in my view, in whose hands the goods are found, at the time of conviction, not any one else ; as against the person who has the goods at the time of the conviction, this right may be asserted. You must be careful to

see that the goods are in existence at the time of the conviction. I remember a case in which some lead had been stolen and sold *bonâ fide* to some ironfounders in market overt. The vendor, who had stolen the lead, was prosecuted to conviction. Before the conviction the lead had been melted down with other lead, and had no longer any individual existence. An action of trover was brought against the ironfounders to recover the value of the lead. The judge at the trial nonsuited the plaintiff, holding that, as the lead had ceased to exist and could not be traced, there was no property, at the time of the conviction to re-vest. You must, therefore, have the goods in existence; you must claim them from the persons who have possession of the goods, at the time of the conviction; and if they will not give them up, an action of trover will lie.

The next question to which I call attention is the second clause of section 24, which says that where the goods have been obtained by fraud, not amounting to larceny, the property in such goods shall not re-vest in the persons who were the owners of them, by reason only of the conviction of the offenders. At one time it was the law that, even if the goods were obtained by fraud—not by stealing or larceny—then the goods re-vested on conviction. That has been altered by the clause to which I have called your attention.

There is also another exception to the rule that a man cannot give a better title than he has, to which I will just call your attention. It is the case of sale under a voidable title, and you will find the case presented in section 23 of the Sale of Goods Act. The statements in this section seem to be very fragmentary. No explanation is given as to how a voidable title may arise. To appreciate and understand this 23rd section you must understand the effect of fraud upon a contract of sale. It is not said how the voidable title arises, but we know, those of us who have had some experience, what is meant by it. It says, "When the seller of

goods has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title." Now, gentlemen, that voidable title refers chiefly to a case of fraud, and I will give you one or two cases illustrating the section. What is the effect of fraud upon contract? Only to render it voidable, not void: voidable at the instance of the party defrauded. It would be very wrong to enact that fraud should make the contract void, because the very person, who has committed the fraud, might even find sometimes it was to his advantage, after all, that the contract should be avoided. It is the person on whom the fraud has been committed who has the election. The contract is voidable; it is therefore existing, and it will exist, for the property to pass either by the contract itself or by delivery in pursuance of it. The contract may be disaffirmed and the property will re-vest in the vendor. The vendee has thus, before disaffirmance, a voidable title. Then, until the contract is disaffirmed, the property in the goods is in the vendee, and if the vendee should, before the disaffirmance of the contract, re-sell the goods to a person who buys them *bonâ fide* for value and without notice of the defect of title or the means by which the goods were obtained, then in any contest between the original vendor and the second vendee, the title of the second vendee will prevail. This you will find laid down in the case of *White* v. *Garden*, in 10 Common Bench Reports, p. 919. Now, how careful you must be! It is only in the case of a *contract* obtained by fraud that the vendee has a voidable title. If the possession of the goods is obtained by fraud without any contract, there is no voidable title. The party defrauded may claim the goods against a third party who has purchased them, except in the case of market overt. One Court committed a mistake as to voidable

title by not carefully looking at the facts. They supposed there was a sale obtained by fraud when there was no sale. There must be a contract transferring the property, before the vendor can lose his property in the goods by a re-sale; consequently, if the fraud does not consist in procuring a contract, then the vendor, apart from the question of market overt, as a matter of course, may find his goods and claim them, no matter in whose hands they may be. This you see, in the case of *Kingsford* v. *Merry*, 11 Ex. 577 and 1 H. & N. 503. The Court of Exchequer, thinking there was a contract procured by fraud, decided against Kingsford; the Court of Exchequer Chamber held that there was no contract between Kingsford and the party who had defrauded him; that such party had got the document or instrument of title by falsely pretending that he had been sent by certain persons to receive the goods from Kingsford. He had not been sent by any person for such a purpose; he had only been sent to inspect the goods. There, therefore, never was any contract between Kingsford and the party who defrauded him; nothing by which the property in the goods could pass. If the goods have not passed from the person defrauded, he is entitled to assert his right to them wherever he finds them. The Court of Exchequer Chamber held there was no contract, no voidable title, and the owner could assert his right to the goods even against the person who had bought them honestly. I will refer you also to another case, because there the goods were apparently sold, but on careful examination no contract was found to exist, and therefore no voidable title. It is the case of *Hardman* v. *Booth*, in 1 Hurlstone and Coltman, p. 803. When a young man I travelled daily in front of a man who, by his conversation, seemed a thoughtful and religious individual. I was delighted with his conversation. He greatly instructed me, and I hoped to be cheered by his example. I found, some time after making his acquaintance, that his name was

Edward Gandell, and that he was the Mr. Edward Gandell who figured so largely in the case of *Hardman* v. *Booth*. He was in the employ of a firm called Gandell and Company (mark the words). Mr. Hardman, knowing that Gandell and Company were a very respectable firm, one day went to their house of business with a view to sell them some goods, and asked for Mr. Gandell. He did not know any of the members of the firm. Mr. Edward Gandell came forward, and without any authority whatever from Gandell and Company purchased some goods from Mr. Hardman in the name of Gandell and Company. The goods so purchased were delivered at the premises of Gandell and Company, and when they came in, Mr. Edward Gandell sent them to the house of business of Gandell and Todd, of which he was a partner, and then immediately, as you would expect, pledged the goods for money. Mr. Hardman brought an action of trover against the pledgee, claiming the goods as his own. The pledgee had refused to give up the goods, relying upon his having made his advance before the disaffirmance of the contract between Hardman and Edward Gandell. The case was heard by Mr. Baron Martin, who at once fastened on the point. He said: "I shall ask the jury this question, whether Mr. Hardman sold the goods to Gandell and Company or to Mr. Edward Gandell? The jury found the goods were not sold to Edward Gandell; that, although Mr. Hardman believed he was selling the goods to Gandell and Company, he did not sell them to Gandell and Company, as Mr. Edward Gandell had no authority to buy the goods in their name or on their behalf. The goods were delivered under a supposed contract. There was no contract, and a verdict was entered for the plaintiff. The Court of Exchequer held, affirming the direction of the learned judge, that as there was no contract, there was no voidable title, nothing to pass the property from Mr. Hardman, and nothing that could give a shred of title to the

pawnbroker who had taken the goods. So there you have this distinction between *White* v. *Garden* and the case of *Hardman* v. *Booth*: in the latter no contract; property had not passed; pledgee no title.

Now you may take also an important case of the same kind—why it went to the House of Lords I really cannot understand—*Cundy* v. *Lindsay*, 1 Q.B.D. p. 348, 2 Q.B.D. 96, and 3 Appeal Cases, p. 459. A respectable merchant in the City named Blenkiron carried on business for a great many years and sold silk ties and satin ties, shirts and collars, and things of the like kind, to a very large extent. In Belfast there was a very respectable house of business, Lindsay and Co. A man who wanted to put money into his pocket by fraud, wrote to Lindsay and Co. and ordered goods not quite in the name of Blenkiron but in the name of Blenkarn. Mr. Lindsay thought the name Blenkarn was the name of the well-known house of business, Blenkiron. He forwarded the goods and sold them, as he thought, to Blenkiron. The goods, of course, did not reach Blenkiron, but were passed on to some one else, and Lindsay and Co. claimed them. The House of Lords decided that as Mr. Lindsay intended to sell, and only intended to sell, to Blenkiron of Wood Street, the respectable manufacturer and merchant who had been there for many years, and Blenkiron had never ordered the goods or thought of having them, there was no contract of sale of the goods; the property in them had not passed; the transaction was not voidable; no title in the person who dealt with the man who passed under the name of Blenkarn. The distinctions seen in these cases must be kept clearly before the mind.

Now, gentlemen, a few statements with respect to performance, and they are so simple that I ought not really to stand before you to mention them. You can read them at your leisure. The vendor is to deliver the goods and the vendee is to pay for them. The acts are to be concurrent unless there be a contrary

agreement. The vendor is to be ready to deliver and the vendee ready to pay. No doubt a student reading these provisions has no difficulty in ascertaining their meaning, but he is pressed by the thought how difficult it will be to determine who is in fault, the vendor or the vendee. When, however, you come to deal with the actual facts of a case, there is not so much difficulty; there is always something on which you can rely to show who is at fault, who was ready and who was unready; payment and delivery must, however, be and are concurrent acts, unless otherwise agreed. Then whether the seller is to send the goods is a question of contract and usage. It depends on the transactions of the parties. If there is no agreement by usage or otherwise, the seller is not bound to send the things; the buyer must go to him and get them if he wants them. If there is a place mentioned, that is to be the place where the goods are to be delivered; they must be sent within a reasonable time, and, if no time is fixed, at a reasonable hour. You must not knock a person up at 11 o'clock when he is in bed with his children, as the good man in the Scriptures was, and ask him to take delivery. Baron Parke held that, unless agreement or usage provided otherwise, the vendor had till 12 o'clock at night for delivery, provided a sufficient time before twelve is allowed, for examination and receipt. By *Startup* v. *Macdonald*, 6 Manning and Grainger, p. 593, it was decided that the vendor might take his caravan down Bread Street and look up at the dark premises where the vendee was and say: "Here I am ready with my goods." Reasonable time within which to deliver, and now reasonable hour during the day for delivery, if the parties have not otherwise agreed.

I may mention very shortly the rule that, if the vendor delivers only a portion of the goods he has agreed to sell, in the absence of agreement, the vendee is not bound to take a portion; if he does, an action for

goods sold and delivered will lie. If the vendor sends a larger quantity of goods than the vendee has bargained for, he is not bound to take any of them. If the vendee takes the whole of the goods tendered he must pay for them. As an illustration of this last rule you can read *Cunliffe* v. *Harrison* in 6 Exchequer Reports, p. 903. I always keep that case in my mind, although there are other cases subsequent. In *Cunliffe* v. *Harrison* a man wanted and ordered ten hogsheads of wine; the vendor sent fifteen: held that the vendee was not called upon to select ten out of the fifteen, and that he was justified in returning the whole. In conjunction with this case may be read *Levy* v. *Green*, 8 E. and B., p. 575.

Then delivery to a carrier, named by the buyer, is delivery to the buyer. The buyer has a right to examine the goods where he has not had previously an opportunity of so doing. He must have a reasonable opportunity.

Gentlemen, it will do you good to read *Isherwood* v. *Whitmore* in 11 Meeson and Welsby, p. 347. That was a case in which a man agreed to buy a number of hats, 2000 I think; the vendor put the hats in casks, locked and fastened, and tendered the casks with their contents to the vendee. The vendor declined to allow the vendee to open the casks or inspect their contents. The Court held there was no tender of the goods to the vendee, and no action would lie for non-acceptance.

Now, gentlemen, if, of course, the vendor does not deliver the goods in time, an action will lie against him for non-delivery. The damage, as a rule, is the difference between the contract price and the price in the market at the time of the breach. The vendor can bring an action for breach of contract, if the time for acceptance is past and the vendee has refused to receive the goods. If the property has passed to the vendee, the vendor can bring an action of debt and recover the whole of the money to be paid for the goods. If the goods have depreciated in value between the time of the contract

and the day of the breach, the vendee can recover damage unless *necessarily* depreciated. These things you can read at your leisure, put in fairly simple language in the code to which I have so often called your attention.

You must give me permission to address you a little time longer, as there are two important subjects awaiting our consideration. These are the vendor's lien for unpaid purchase-money and his right of stoppage *in transitu*. These are great and important remedies, and they must be thoroughly understood by you. The vendor's lien is for unpaid purchase-money and exists although the purchaser is solvent; the right of stoppage *in transitu* is the right of the vendor who is unpaid, in case of the insolvency of the vendee to stop the goods while they are *in transitu*. A dear friend of mine, thirty-five years ago, sent me a copy of his book on Stoppage *in transitu*. I looked at it to-day and found the same objection as I did then, that he has taken on himself to discuss in his book on Stoppage *in transitu* matters which, if a vendor's lien or the right to stop *in transitu* is understood, ought not to be brought into the discussion of these two subjects. I have told you the vendor's lien and the right of stoppage *in transitu* do not come into existence, until the property in the goods has passed to the vendee. Until then, there is neither vendor's lien nor right of stoppage *in transitu*. Therefore it is not elegant, in a book on Vendor's Lien and Stoppage *in transitu*, to reproduce whole pages of "Blackburn on Contract of Sale" presented to us to show whether the property in the goods sold has passed to the vendee. A writer, who is treating only of Stoppage *in transitu*, ought to assume that the property has passed. The gentleman apparently (unless I am very wrong) who prepared the Sale of Goods Act has really never appreciated this matter, because, as I told you, in section 39 it is stated that, "Subject to the provisions of this Act, and of any statute

in that behalf, *notwithstanding* that the property in the goods may have passed to the buyer, the unpaid seller of goods has" the following rights: *inter alia*, a lien for unpaid purchase-money. Gentlemen, it is in consequence, and only in consequence, of the property having passed, that the vendor needs the lien, and that the lien can exist. If the property has not passed to the vendee, no question of lien can arise. You want no lien, and can have no lien, on your own goods. If the goods are still yours, you can deal with and dispose of them, as you like. As I told you, the vendor can burn a parcel of goods which he has prepared for the performance of a contract, and no action of trover will lie against him, if the property in the goods has not passed to the vendee. It may be that, in consequence of such act, the vendor will not fulfil his contract in time, and an action for damages may be brought against him. The vendor, in my judgment, cannot have a lien unless the property has passed. Another objection I take to the Sale of Goods Act, is the discussing of the vendor's lien and the right of stoppage *in transitu* together, and having in one or two sections matters which relate to both. I like to study them distinctly, and I never allow a thought of stoppage *in transitu* to arise when I am discussing the vendor's lien. The vendor's lien supposes the vendor to be still in possession of the goods. The right of stoppage *in transitu* supposes that the property has passed and delivery made. As I have told you, unless that is otherwise agreed, the right of the vendee to have delivery is concurrent with a readiness on his part to pay the purchase-money. Of course, in the absence of any express arrangement, the money is to be paid down within a reasonable time; paid at the time of delivery; but the vendor has a lien which is more than possession, which is something arising out of his original ownership, which he may assert as against the vendee. Therefore, the property must have passed

and it therefore should have been said, that an unpaid seller's right of lien arises *in consequence* of the property having passed. It should not be said "*notwithstanding* it may have passed." Gentlemen, the lien is founded on possession. Now here let me interpose for a moment to contrast the two. A vendor's right to stop *in transitu* never arises until the property has passed to the vendee, and the goods are no longer in the possession of the vendor. The vendor's lien rests on possession, and you will find the whole matter discussed in the case of *Bloxam* v. *Sanders* in 4 Barnewall and Cresswell, p. 941, and in the case of *Dixon* v. *Yates* in 5 Barnewall and Adolphus, p. 313. Now, gentlemen, if the vendor has parted with the possession, ordinarily his right of lien is gone. He may, if he has parted with the goods to a middleman, for the purpose of being carried to the vendee, have a right to stop *in transitu*, but his right of lien no longer exists. Now, gentlemen, the lien will be gone as soon as the goods are delivered to the vendee or a carrier for the vendee, or if the vendor has given an order to a warehouseman for the delivery of the goods, and the warehouseman has agreed to hold them for the vendee. In such a case as that the lien is gone. If the warehouseman has not agreed to hold them for the vendee, and the vendee becomes insolvent before the warehouseman assents to hold the goods for the vendee, in that case the vendor may withdraw the order and he may assert his right to the retention of the goods notwithstanding the order was given (*McEwan* v. *Smith*, 2 House of Lords cases, 309). The vendor who has agreed to give credit, say for three months, to the vendee, has no lien on the goods sold. The vendee, if the property has passed to him, has a right to the immediate possession, unless it has been otherwise agreed, and the vendor has no lien because the vendee is not in default in matter of payment. If the goods remain in the possession of the vendor until the vendee

has made default in payment, the vendor in such case, on default being made, has a lien for the unpaid purchase-money. Then I should have said, until the passing of the Sale of Goods Act, the lien of the vendor was gone as soon as the vendor really and effectually agreed with the vendee, that he would hold the goods for the vendee; that is, the vendor became the warehouseman of the goods for the vendee. In such a case, I was instructed, and until the Sale of Goods Act I believe it was the law, that the vendor's right of lien was gone; that the vendor's lien and the possession of the vendee were incompatible; but this Act says, and I suppose it was intended to effect a change (clause 2 of section 41), the seller may exercise his right of lien notwithstanding that he is in the possession of the goods as agent or bailee for the buyer. I told you these two things were regarded as absolutely inconsistent. You now must learn and state, that the vendee has possession of the goods sold, by the arrangement with the vendor to hold them for him, and the vendor has notwithstanding possession of the goods so as to enable him to assert a lien on them.

The next thing to which I want to call your attention is this: that an unpaid vendor does not necessarily mean a man who has not got the purchase-money; he is an unpaid vendor, if the money is to be given him, and it has not been given him; but he is not an unpaid vendor, within the meaning of the clauses of the Sale of Goods Act relating to vendor's lien, simply because he has not been paid; for if the vendor has agreed to give credit until the credit has expired or the bill has matured, or to take a bill of exchange, for six months, there is no lien. The vendor has all he is entitled to have under the contract; and therefore, whilst the credit is running, or whilst the bill of exchange is maturing, the vendee can maintain his action of trover against the vendor who withholds the goods. The property has passed, and the only question is whether the vendee, who , has the right to posses-

sion. There is nothing to separate the right of possession from the right of property. There is no money due, nothing at present that the vendor can demand. The Sale of Goods Act has put beyond all doubt a question which was at one time in dispute, namely, whether the vendor had a lien, after the credit expired, or the bill of exchange was dishonoured, on the goods which had continued in his possession. In this case the seller has the goods in his possession at the expiration of the credit or the dishonour of the bill. The Sale of Goods Act provides that in such a case the vendor has a lien just as if no credit had been given. This is a matter of some importance, because it frequently happens that goods are left with the vendor for a considerable period of time, and if the credit has expired, and the goods are still in the possession of the vendor, he has a lien on the goods sold from that moment in respect of the purchase-money which he ought to receive.

The next thing I place before you, is this, and it is very important too, that although the vendor has ordinarily no lien on the goods in the case of credit being given, yet if the vendee becomes insolvent before the credit has expired and whilst the vendor has possession of the goods, he is entitled to retain the goods and to a lien on them, just as if no credit had been given. Follow me. Goods have been sold on a bill of exchange for four months. The bill of exchange has been given. There is four months credit: the vendee can ordinarily ask for the goods at any moment, and if delivery were refused the vendor could not resist an action for the conversion of the goods. Suppose, however, the vendee within a month is insolvent, and the goods in the possession of the vendee. The vendor can say: "I do not care what credit I gave you; you are insolvent, and I shall now retain these goods as against you until the purchase-money is paid."

Such are the principal propositions of law which you will find in that part of Lord Blackburn's work in

which he treats of a vendor's lien. Read carefully the case of *Dixon* v. *Yates*, 5 Barnewall and Adolphus; that case establishes that if the vendee has sold some or all of the goods, and vested the property therein in a sub-vendee, the vendor's lien can be asserted as against the sub-vendee, even although the sub-vendee has paid the whole or part of the purchase-money to his vendor. The first vendor may assert his lien as against the sub-vendee, although he has allowed the sub-vendee to remove or have possession of some of the goods purchased, unless there is a clear intention that the delivery of a part shall be deemed to be a delivery of the whole. The case of *Dixon* v. *Yates*, if carefully studied, will greatly instruct you as to what acts by a sub-vendee, acquiesced in by the first vendor, may amount to possession being given of the whole or part of the goods. May I say to you, that whenever you are reading, and you find a statement that such and such acts do or do not amount to taking possession, note the case and its circumstances; make a note of it, and have, as far as you can, in your possession, all the decisions as to what constitutes or does not constitute possession. You will find in that case the Court held that, although the sub-vendee had gone and marked the puncheons of rum which had been sold, and actually coopered them, these acts did not constitute a taking possession, and the vendor was entitled to retain possession of the goods sold, on the bills of exchange being dishonoured which were given for the price. There is in the Sale of Goods Act the statement that, where the property in goods has not passed to the buyer, the unpaid vendor may not only bring an action, with all the usual remedies, for non-acceptance and payment of the goods, but that he has a right of withholding delivery similar to and co-extensive with his rights of lien and stoppage *in transitu* where the property has passed to the buyer. I cannot understand a man having a remedy by withholding his own property. If the property in the goods has not

passed to the vendee, the vendor can do what he likes with his own goods; he can withhold the delivery of them or sell them. If he does not deliver in conformity with the contract, an action will lie against him for damages for non-delivery. It is no remedy for him to keep his own property—that he can always do, and without the provisions of sub-section 2 of section 39. Keep the rights of the vendor's lien for unpaid purchase-money and the vendor's right to stop *in transitu* quite distinct. Do not introduce either of them into a case where the property in the goods has not passed to the vendee. Sub-section 2, section 39, gives no additional remedy to the vendor, and confuses the study of important principles of the law relating to the sale of goods. The great thing is to learn, when the vendor, who is unpaid, is not obliged to deliver goods under the contract. He is not obliged to deliver when the purchaser becomes insolvent.

In the case of *Ex parte Chalmers*, in Law Reports, 8 Chancery Appeals, p. 289, Lord Justice Mellish said that when the purchaser becomes insolvent the seller, notwithstanding he may have agreed to allow credit for the goods, is not bound to deliver any more goods under the contract until the price of the goods not yet delivered is tendered to him, and if a debt is due to him for the goods already delivered he is entitled to refuse to deliver any more till he is paid the debt due for those already delivered, as well as the price of those still to be delivered.

Let me now spend a few minutes in considering the vendor's right of stoppage *in transitu*. This right can only be exercised by a person who is a vendor, or stands in the situation of a vendor. Thus, an agent in a foreign country who has bought goods for a principal in England, and who is forwarding them to this country, will be deemed to be a vendor; so also, an agent of the seller, to whom the bill of lading has been indorsed. A person who is a surety for the payment of the goods would not be deemed to stand in the position of a vendor. Again, the right to stop *in transitu* never arises until the

property in the goods has vested in the vendee, and the goods have been delivered to the vendee, or the vendor has parted with the possession of them. The delivery mentioned in the last sentence means delivery to a third person for the purpose of being conveyed to the vendee. Undoubtedly by delivery of the goods to a carrier, who receives them for the vendee, and undertakes to convey them to the vendee, the goods are in the possession of the vendee. This has been established from the very earliest period, and yet it is in such a case, that the right to stop *in transitu* arises. The property in the goods has passed to the vendee; the vendor has parted with the possession; the vendee is, by means of the delivery to the carrier, in possession of the goods. In such a case it has been provided that, if the vendor, who is unpaid finds that the vendee has become insolvent whilst the goods are *in transitu*, the vendor may stop the goods whilst they are *in transitu*—that is, as long as they are in the possession of a person who is a middleman between the vendor or vendee, or in the possession of an agent for the purpose of carrying the goods to their destination. If the goods have come into the possession of the vendee, otherwise than by the delivery to the middleman, or have come into the vendee's possession by a subsequent agreement of the middleman to hold expressly the goods as bailee for the vendee, the right to stop does not exist. The transit is at an end.

If the right of stoppage exists, the payment of part of the price, does not take it away; and the right still exists as applicable to the whole of the goods sold. In discussing stoppage *in transitu* it is no use giving me all the cases to show the property has passed. In treating of stoppage *in transitu*, I assume the property has passed. I also assume there is possession of the goods on the part of the vendee—possession, however, only of a certain kind and to a certain extent. The vendee may be in possession when the goods are

delivered to a carrier for him, but the possession which is acquired by a vendee through the goods being delivered to a carrier, for the purpose of being conveyed, either by land or water, to the vendee, is not such a possession as prevents the vendor from exercising his right of stoppage *in transitu*. He can stop the goods whilst they are *in transitu* and in the hands of a carrier or a middleman for the purpose of the goods reaching the vendee. When once the goods are delivered to the vendee, other than by delivery to a middleman, there is no transit, or the transit is at an end. On this point let me call your attention to the case of *Schotsman* v. *Lancashire and Yorkshire Railway Company*, 2 Chancery Appeals, p. 332. In that case the goods were put on board the vendee's own vessel, trading from Rouen to London, and the bills of lading were made out in favour of the vendee. The goods were put on board the vendee's own vessel, which was being put up as a general ship. The vendee became insolvent, and the question was whether the vendor had a right to stop the goods on their passage to England, and Lord Chancellor Chelmsford and Lord Justice Cairns decided that putting the goods on board the vendee's vessel at Rouen was a delivery to the vendee himself; that the vendee had possession of the goods; that the possession of the vendee was not by means of the act of a carrier or third person who held the goods for the purpose of forwarding the goods to their destination: consequently that no right of stoppage *in transitu* could be exercised; that, in fact, the goods had never been in transit. It is clear, if the vendee sends to the place of business of the vendor and gets the goods put into his own cart, he has possession.

In order that the right of stoppage *in transitu* should arise, the vendee must have become insolvent. It is not necessary that the vendee should have been made a bankrupt, or even committed an act of bankruptcy.

It will be sufficient, if it is clear he is unable to meet his business engagements.

The next thing to endeavour to define is the transit. You must look at the place of destination mentioned by the purchaser, or the terms of the consignment, and the place to which the things are to be sent. Now, gentlemen, it will be well to offer a few illustrations for your guidance. If the vendee, who may be a Canadian merchant, and the goods will ultimately be sent to Canada, says, "Send the goods in to Mr. Johnson, my packer, in Friday Street" (for there was the well-known business of packer in London in former days, when men used to buy small parcels of goods from various houses of business and have them sent to one place in order to the goods being packed up and sent abroad); if the goods have been put into the hands of a carman for delivery to the packer, before the goods have reached the packer the vendor can say, "Please give me back the goods." He is entitled to do so and to resume possession of the goods: the destination is not reached. If the goods have reached the premises of the packer the transit is ended. The vendor has no right, if the vendee is insolvent, to resume possession, although the goods are to be forwarded to another and distant place. As between the vendor and the vendee, the packer's warehouse is the destination. The goods will not be forwarded on another journey until fresh orders and fresh directions are given. Again, suppose I tell the vendor, the goods are to go to Mr. Johnson, of Hull, and there remain until I give instructions whether they are to go to Hamburg or Kiel; if the goods reach Mr. Johnson, of Hull, and the goods are in his possession, the transit is at an end. If I say to the vendor, "The goods are to go to Kiel, *viâ* steamer from Hull, care of Mr. Johnson," although he is to start them on their journey when they reach Hull, the transit, in my opinion, is not at an end when the goods reach Hull. The goods are still in transit, and the

vendor can stop the goods before they reach Kiel. Take these illustrations with you, and you will perhaps have no difficulty in arriving at a correct conclusion as to what in any case the transit is.

There is another thing to which I must call your attention. The transit may be determined by the defendant getting possession of the goods before they reach the agreed point of destination. Supposing the goods are to be sent to a wharf near London Bridge: it has been held that if the vendee goes down the river and asks the captain of the steamer for the goods, and obtains possession of them, the transit is at an end, although the goods have not reached the place which was in the mind of the vendor when he started the goods. Then, gentlemen, the right to stop *in transitu* is gone as soon as ever the carrier or the middleman puts the goods into the possession of the vendee, or changes the character in which he holds them, and agrees to hold them as bailee or warehouseman for the vendee.

I may tell you that the mere bankruptcy of the purchaser does not in itself operate as a countermand of delivery nor prevent his taking delivery of the goods purchased. The vendee, if insolvent, is at liberty to reject the goods.

How is the right of stoppage *in transitu* effected? By notice given to the carrier, or to his servants who are in charge of the goods, if the goods are in the possession of a servant of the carrier. If the goods are on board a vessel on its voyage, it is no use giving notice to the owner at Liverpool, unless you give it under such circumstances that he has the opportunity by due diligence of informing the captain, and requesting him not to deliver the goods to the vendee. I need not tell you that in our days, the owner of the vessel, or other person to whom the request to stop is properly made, should use the telegraph, or any means that shall be quickest for effecting the request of the vendor.

So far, therefore, for the stoppage *in transitu*.

It supposes property in the vendee, and it supposes that the goods have been put into the possession of some one for the purpose of what is called taking the goods home, or taking them to the place which is appointed for them. It can be exercised before the goods reach their destination. It cannot be exercised after the vendee has obtained what is sometimes called "actual possession," as by delivery to the vendee, or by the carrier having agreed to change his character from that of carrier to that of bailee. So much, therefore, for this law relating to stoppage *in transitu*. Do not trouble yourself with the question of whether the property has passed. That relates to another and different part of your study altogether.

Now, gentlemen, the only thing which I need tell you, in addition to what I have already said, is the way in which the stoppage *in transitu* may be defeated. You know very often goods are put on board a vessel under what is called a "bill of lading," and from *Lickbarrow* v. *Mason* down to the present time there have been great discussions as to the circumstances under which the right of stoppage *in transitu* may be defeated. It is now clear and settled law that if the goods are represented by a bill of lading—that is to say, have been put on board a vessel and a bill of lading taken in such terms, or subsequently endorsed, as to give the vendee the property in the goods, if the vendee, whilst the goods are *in transitu*, parts with the bill of lading to a *bonâ-fide* purchaser for value, the right to stop *in transitu* against the sub-vendee does not exist. If the vendee, instead of selling the goods, parts with the bill of lading to a *bonâ-fide* pledgee, the right of stoppage *in transitu* is defeated to the extent of the pledge. You will find the authorities all collected under the head of *Lickbarrow* v. *Mason* in Smith's Leading Cases. It is enough for me to refer you to that case and the authorities cited under

it. I hope the few observations I have offered you may facilitate their study. I may also state that a contract of sale is not rescinded by the mere exercise by an unpaid seller of his right of lien or retention or stoppage *in transitu*.

Now, gentlemen, my task is finished. I have had a great pleasure in addressing you. I must have taxed your attention very much to-night, by asking you to stay longer than the appointed hour; but the law relating to the sale of goods is a very serious and solemn subject, and requires most grave study before one can speak advisedly upon it. I have done the best I could to give you a plain, simple running commentary on nearly all the important provisions of the Sale of Goods Act, and if I shall render assistance to any one of you in the study of that Act, I shall be amply repaid for the time and labour I have expended in the discharge of the duty I undertook.

As I may, perhaps, not see you any more, and this may be the last time I shall have the privilege of speaking to those who are preparing for the noble profession of the law, I should like to say a few words to you of advice and encouragement. I should like to use my own language; but as I grow older, I have before me more constantly the example of one, and the teaching of one, whom I increasingly love, and when I have his language, suitable to my purpose, I cannot use my own. I do not mention his name, as this is not a fit place in which to mention it; but, using his language, I say to you: "Be thorough in all you do, and remember that, though ignorance often may be innocent, pretension is always despicable. Quit you like men, be strong, and the exercise of your strength to-day will give you more strength to-morrow. Work onwards and work upwards; and may the blessing of the Most High soothe your cares, clear your vision, and crown your labours with reward."

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